UNITED STATES OF AMERICA.

Supreme Court of the United States.—

OCTOBER TERM, 1911
No. 36.

PACIFIC STATES TELEPHONE & TELEGRAPH COMPANY, Plaintiff in Error,

vs.

STATE OF OREGON, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR, and for Certain States praying to be heard as Friends of the Court.

GEO. FRED. WILLIAMS,
Counsel for the States of California, Arkansas, Colorado, South Dakota and Nebraska;
Of Counsel for the State of Oregon.

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POINT OF CONTENTION.

Oregon Constitution, Art. IV, SECTION 1.

"The legislative authority of the State shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly."

Is a tax law invalid under the Constitution of the United States which is thus proposed and thus enacted by the people at the polls?

TABLE OF CONTENTS.

The Issue: United States Constitution, Article IV, § 4.

The real issue raised by the assignment of errors is to be found in the eighteenth thereof, claiming an invasion of appellant's rights under U. S. Constitution, Art. IV, § 4, as follows:

"Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion: and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

(Exact form as engrossed;—Farrand, Records of the Federal convention, Vol. II, p. 662.)

The other claims under Art. I, §§ 2, 3, 4, 8, 10; Art. IV, § 3; Art. V, relate to the requirements of the U. S. Constitution for legislative action in the States. It may be conceded that these requirements would impose upon the States the duty to maintain legislatures for national purposes, and the short answer to the appellant's claims in this regard is that such a legislature is maintained in Oregon in due form and with full powers to conform to the requirements of the U. S. Constitution.

The claims under the Article of Amendment XIV are not to be considered, because the State of Oregon has promulgated the tax law of which appellants complain, every citizen of Oregon is subject to laws so enacted, and there was due process and equal protection accorded to the appellant pursuant to the Constitution of Oregon. That constitution and

the form of law-making it provides are not subject to revision by this court unless jurisdiction is taken under above Art. IV, § 4.

The Supreme Court of Oregon has determined that there is no infraction of the Constitutions of Oregon and the United States.

"The courts of the U. S. adopt and follow the decisions of the State Courts on questions which concern merely the constitution and laws of the State."

Luther *v.* Borden, 7 How. 1.
Duncan *v.* McCall, 139 U. S. 449.
Taylor *v.* Beckham, 178 U. S. 578.

"The people of the States created, the people of the States can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States; that it must be of the Republican form."

Chisholm *v.* Georgia, 2 Dall. 448.

I. The Subject-Matter of Contention.

A. *THE OREGON SYSTEM.*

"The legislative power of the State shall be vested in a legislative assembly—but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly."

"The first power is the initiative" based upon a petition by eight per cent of the legal voters.

"The second power is the referendum" based upon a petition by five per cent of the legal voters.

Such is the plan at issue, adopted by Oregon in 1902.

1. THE PRECEDENT IN SWITZERLAND.

It was not an experiment. Some of the Swiss Cantons had legislated in mass meetings from days of antiquity. After the republic was formed in 1848 by union of the Cantons, all the vices to which free governments are subject rent the politics of the republic. Political bosses, legislative corruption, corporate influences, partisan violence and intrigue were the rule in political life.

In 1874 the referendum was adopted in national affairs, and in 1891 the initiative was added. Experience justified these measures in the Cantons and republic. The evils abated, popular verdicts were found to be considerate and wise, party virulence was allayed, experienced legislators were retained in office, corruption ceased. The system became fixed in the confidence and affections of the people, until it was unshakable: This republic is the best governed country on earth.

Hon. N. Droz, ex-President of Switzerland, said of it: "Under the influence of the referendum a profound change has come over the spirit of Parliament and people. The net result has been a great tranquilizing of public life."

Prof. Charles Borgeaud of the University of Geneva, wrote "The Referendum has won its case. Unquestionably it has proved a boon to Switzerland and has no more enemies of any following in the generation of to-day."

The only Canton in which the political boss and corrupt influences remained dominant was and is Freibourg, where direct legislation did not exist and could not be secured under the tyrannical and venal rule of a political dictator.

South Dakota adopted this system in 1898. Such was the experience which warranted Oregon in adopting this system.

2. DELIBERATION IN ADOPTION.

The passage of the constitutional amendment for direct legislation in Oregon was not the result of caprice. It had

long agitation in the press and party conventions. In the legislature of 1899 there were only 13 opposing votes. Both political parties approved it in their conventions of 1900. In the legislature of 1901 there was but one opposing vote and in 1902, when the vote was taken, all the political conventions favored it, and it passed by 62,024 yeas to 5,668 nays.

It should be noted that this amendment was the result of the vote of the legislature, submitting it to popular vote according to the then existing constitutional forms.

Not only has Oregon adopted the constitutional amendment, but in 1910 by vote 23,143 yeas to 59,974 nays (questions submitted Nos. 304, 305) on reference to a referendum by the legislature, a proposition for a constitutional convention was defeated.

Oregon Election Pamphlet, 1910, p. 18.

The argument used against this convention and which defeated the proposition was that its purpose was to have the convention take out the Initiative, Referendum and Recall from the constitution and then proclaim its enactment without submission to the people for ratification.

3. PRACTICABILITY THROUGH THE MODERN BALLOT.

It must be borne in mind that this case involves a method of procedure in State affairs which was not in 1787 practicable. So far was the ballot then unknown that the people of New York in framing their first constitution gave the legislature authority to make a trial of the ballot system and to repeal the provisions if the system did not prove practicable. Furthermore, distances and methods of communication offered at that time obstacles which are now inconsiderable. The possibility of extending a town meeting to the limits of a State had not occurred to anyone at that time owing to the apparent physical difficulties. Now, however, experience has demonstrated that an actual poll of the people can be taken upon

any proposition with ease and certainty. In considering, therefore, all old authorities which suggest that the delegation of legislative power is an essential feature of our form of government, we must accept such statements with the limitations of the then existing methods. All statements of this nature must be regarded as *obiter dicta* and not applicable to the existing conditions which have been produced by the growth and development of our electoral system.

4. EXCLUSION OF "CAPRICE" AND "MOB RULE."

There is another feature which must materially qualify the views of all previous statesmen and judges. In contemplation of previously existing Democratic forms, the actual physical assemblage in one place of all the people was involved. No doubt there may be in popular assemblages a high degree of nervous tension, susceptibility to the influences of speech, of cabal and of skillful leadership. A condition of excitement may be created which is not consistent with careful deliberation and which may contain too much of the element of sentiment or sympathy.

Even these conditions may not be inconsistent with decisions which in the long run are righteous and advisable; there may be occasional lapses from good judgment, but the town meetings of New England are living illustrations of the general reliability of popular assemblages in the decision of public questions.

There has been ample opportunity in 300 years of experience with these gatherings to test the dangers of what is so lightly designated as "mob law," and "the caprice of the majority," but it may be said that no institution in our country has so well stood the test of experience as the New England town meeting.

The jury system is open to similar objections, but it has persisted nonetheless and has become one of the cornerstones of the fabric of human liberty.

These considerations emphasize the absence of the dangers to which popular gatherings are exposed by physical contact, where such methods of deliberation are provided as we find in Oregon under the direct legislation system. Petitions for legislation must be filed three months before the day of election. Not only are the questions to be considered matters of general public notoriety, but the State of Oregon provides that citizens may offer argument for and against the proposed measures and these arguments, together with the text of the proposal, are printed at the expense of the State and placed in the hands of all the voters. There is thus laid before the voters complete information as to the measures upon which they are to vote, and carefully epitomized arguments for and against them. These matters are before the voter in his home, the object of study, deliberation and discussion. He is freed from passion or influence in the consideration of his duty as a voter, and probably in the history of Republican institutions, no better system has been devised for securing from the voter a calm, dispassionate and patriotic decision as to his duty with respect to proposed legislation. "Mob Rule" is far removed from this system.

It will also be observed that the voter is not called upon to study the character of men but the merits of measures, and an entire shifting of the character of political discussion is thus accomplished. Personalities of men cease to be determining factors when the merits of concrete propositions become the objects of consideration. The training of the voters in their public duties is such as to practically revolutionize the character of political controversies, to elevate the standard of citizenship, suppress passion and prejudice and to bring nearer than ever to perfect form, the deliberations of the people upon their own affairs.

B. *THE DEMAND FOR THE SYSTEM.*

1. IMPERFECT POLITICAL CONDITIONS.

It is apparent that our country is in a condition of reaction against the control of privilege as powerful as that of France in 1792, of England in 1838, of Switzerland in 1848.

In France the republic was created, in England parliamentary government became a reality, and in Switzerland the Union of States was perfected; here we are perfecting our Democracy. The present movement constitutes the most momentous political revolution in our history, conducted without bloodshed and even without acrimonious political contests. It is a movement economic in its nature and accordingly steady and irresistible. Its objects are political, and it moves on like a tidal-wave which legislatures and courts cannot halt.

The causes of this movement are apparent. Political organizations have not been responsive to the popular will. The effort to obtain good government by the selection of "good men" has failed. Legislators have become the people's masters in the exercise of unlimited power. Party platforms are not regarded as pledges. The people are unable to trust their servants. A power has developed which dominates politicians, parties and public servants. Evidences of repeating, bribery, corruption and perversion of delegates, representatives and officials in cities and States have persisted, and even the judiciary has at times been found subject to influences, hostile to the people's interests. The average citizen has abandoned efforts to regulate party machinery and to participate in party caucuses.

The new political movement aims to clear the avenues between the people and their institutions.

The perversion of party caucuses has been met by the plan of direct nomination of candidates at the polls. Even the direct nomination of delegates to Presidential conventions is being accepted; repeated scandals and notorious corruption of

legislatures in the election of U. S. Senators have caused two-thirds of the States to devise methods of circumventing the constitutional method of election by the legislatures, and it is probable that in the immediate future the National Constitution will be amended to secure direct election of Senators by the people.

The numerous laws of States for the prevention of corrupt practices and the limitation of campaign expenditures have been supplemented by national legislation, which is probably but the beginning of drastic enactments to maintain the purity of elections.

2. FAILURES OF THE LEGISLATIVE SYSTEM.

The founders of the Republic dreaded the power of the executive. Patrick Henry inveighed against it. Jefferson insisted with impassioned force that the Republic would fall through the usurpation of power by the judicial department.

Prophecy takes a hard test by the light of experience. All fear of the executive has ceased after more than a century of trial. For the first time the judiciary has become a subject of apprehension in the last few years.

But it is the legislative department that has proved the weakest of the departments of State.

The people are strengthening this branch of Democratic government by applying more Democracy.

The Sovereignty is being placed in practice, where it exists in theory, with the people; the instrument is Direct Legislation.

In adopting this system there have been no interferences with the regular operations of the customary legislative machinery. Representative government remains, but its products are no longer beyond popular reach. Vicious and corrupted acts can no longer be fastened upon the people against the will of the majority.

Experience has proven that it is not safe to trust delegates with unlimited power to make laws, and the question presented in this case is whether there remains in the people the power to apply controlling influences to them.

The history of this year's legislation furnishes a long list of broken pledges.

The governors of Colorado, Maine, New York, New Hampshire have publicly denounced the legislatures of their States for failure to redeem the direct promises of party platforms.

Governor Shafroth of Colorado declared that in the longest legislative session in thirty years not a pledge has been redeemed.

In Maine a direct primary act was refused by the legislature and at the polls under the "initiative" amendment of the Constitution, the measure was adopted by vote of 55,840 yeas to 17,751 nays.

In 1902, under a law permitting an expression of public opinion at the polls, the people of Illinois favored by a vote of 428,000 to 87,000 a Constitutional amendment providing the initiative and referendum. The legislatures for eight years took no action. In 1910 the people again made the demand by vote of 447,908 yeas to 128,398 nays. All the political platforms indorsed it. The legislature this year has refused to pass the measure.

Two investigations are now in progress involving corruption in the election of Senators of the United States; it is not denied that $107,793 was expended to secure the election of a Senator by the legislature of Wisconsin.

Even in England faith in Parliamentary government has been shaken. Mr. Lecky says:

"A growing distrust and contempt for representative bodies has been one of the most characteristic features of the closing years of the nineteenth century."

Democracy *v.* Liberty, I. pp. 142, 143.

Mr. Dicey remarks:

"Faith in Parliaments has undergone an eclipse."

13 Harvard Law Rev. 73, 74.

Gov. Woodrow Wilson has described the political situation as follows:

"Many of the old formulas of our business and of our politics have been outgrown. We still revere 'representative government,' but we are forced to admit that—the governments we actually have have been deprived of their representative character. They do not represent us. They are filtered too fine through the sieve of secret caucuses and other machine processes; there are too many conventions preceded by too many private conferences between us and the persons through whom we legislate and conduct our governments.

We, the people, have not free access enough to our own agents or direct enough control over them. We mean by one change or another to make our governments genuinely popular and representative again. We are cutting away *anomalies not institutions.*" Boston Common, May 13, 1911.

Such are the failures and scandals which have created distrust in parties and legislatures and caused the people to secure direct control of their political machinery, their officials and legislative bodies through direct primaries, elections and legislation.

"States and governments were made for man; and at the same time how true it is that his creatures and servants have first deceived, next vilified and at last oppressed their master and maker."

Mr. Justice Wilson in Chisholm *v.* Georgia, 2 Dal. 455.

C. *THE EXTENSION OF THE SYSTEM.*

1. CONSTITUTIONAL AMENDMENTS ADOPTED.

The system of the initiative and referendum has been adopted by popular votes as follows:

State.	Year.	Yea.	Nay.
South Dakota,	1898		
Utah,	1900		
Oregon,	1902	62024	5668
Montana,	1906	36374	6616
Oklahoma,	1907	180333	73059
Maine,	1908	51991	23712
Missouri,	1908	177615	147290
Arkansas,	1910	91363	39680
Colorado,	1910	87141	28698
Arizona,	1911		
California (latest unofficial),	1911	138181	44850

Utah voted an amendment for direct legislation in 1900 but left it to be executed through enabling acts of the legislature, which acts have not been passed.

Thus eleven States have already incorporated the initiative and referendum into their Constitutions.

The legislatures of the following States have voted to submit the initiative and referendum for popular ratification: Nebraska, Wisconsin, No. Dakota, Wyoming, Washington.

In Nevada, where the referendum is in the Constitution, the legislature passed this year a resolve for the initiative for the second time, and the amendment is to be voted on at the next election.

As such amendments (excepting a defective proposal in Missouri in 1904) have never been rejected by popular vote in any State, it is not impossible that, by the time the court

reaches its decision in this case, these six States will have been added to the list and that seventeen States will then have adopted this system.

2. MOVEMENTS IN OTHER STATES.

The legislature of Idaho has submitted for popular vote the Constitutional amendment for the referendum.

In New Mexico the Democratic platform declared for the initiative and referendum, but only the referendum was incorporated in the Constitution.

Illinois in 1901 adopted an advisory initiative, and as above stated (I. B. 2), the legislature of the State has refused to accede to the demands of enormous majorities in favor of the Constitutional amendment for the initiative and referendum.

In Illinois (in 1910) both party platforms favored the initiative and referendum.

In 1906 the people of Delaware by popular vote instructed their legislature to provide a Constitutional amendment for the initiative and referendum.

In Delaware March 17th, 1911, the House of Representatives voted on the Constitutional amendment for the initiative and referendum by 16 yeas to 9 nays, 2/3 vote being necessary for a passage.

The municipalities in more than one-half of the States of the Union have received charters containing the initiative and referendum.

In Iowa the recent legislature rejected the amendment in the House by a vote of 58 yeas to 42 nays.

In Kansas all the political parties declared for the initiative and referendum in their platforms of 1910, but the measure failed of the necessary 2/3 vote in the legislature. The House of Representatives passed the measure by 107 yeas to 10 nays; the Senate defeated the measure by a vote of 23 yeas to 15 nays, a 2/3 vote being required in both Houses. Gov. Stubbs was elected on the platform pledged to the initiative and referendum.

In Michigan a vote for the Constitutional amendment passed the House by 74 yeas to 20 nays, but the Senate defeated the amendment by a vote of 15 yeas to 14 nays, a 2/3 vote being required.

In Minnesota, the Democratic platform declared for this Constitutional amendment, but the resolve was defeated in the legislature.

In Massachusetts a Constitutional amendment was defeated June 27th, 1911 by a vote of 125 yeas to 75 nays, 2/3 being required.

In West Virginia Gov. Dawson in his annual message endorsed the initiative and referendum and prophesied the passage of the resolve.

In Ohio, Gov. Harmon was elected in 1909 on a platform pledged to the initiative and referendum.

In New Hampshire the Democratic platform of 1910 pledged the party to the initiative and referendum.

In New Jersey the present Governor is in favor of such amendment.

In Pennsylvania in May, 1911, the judiciary committees of both branches of the legislature reported favorably upon the passage of a Constitutional amendment for the initiative and referendum.

3. NATIONAL MOVEMENT.

The Democratic National platform adopted at Kansas City in 1900 declard for the initiative and referendum.

On the 12th day of June, 1911, a memorial was presented in the Senate of the United States from both branches of the Wisconsin legislature calling for the submission of an amendment to the United States Constitution to provide for the Initiative, Referendum and Recall for legislation and officials and the initiative for Constitutional amendments.

Within the dominant party a new organization has been formed entitled the "National Progressive Republican League.

It has leaders of great ability, and from the Mississippi to the Pacific is rapidly obtaining control; it proposes to contest for the control of the next National Republican convention. Its platform of principles is confined to five measures, designed for the sole end "that the people may control and hold their officers responsible." These are the measures:

1 Direct election of U. S. Senators by the people.

2 Direct primaries for nomination of elective officers.

3 Direct election of delegates to National conventions.

4 Constitutional amendments for Initiative, Referendum and Recall.

5 Thoroughgoing corrupt-practices' act.

The force of this movement is made more powerful by the fact that both political parties are involved in it, and that in many States all the parties have united in its favor.

Sen. Works of California, April 10-'11, in the Senate spoke as follows:

"Congress need not delude itself with the belief that this demand for direct legislation comes from fanatics and radical reformers only. The demand is universal and is supported by the best citizens in the country without regard to party. The absolute necessity for some legislation that will put the people in possession and control of their government, and drive the interests and political bosses out of politics, and the official life of the nation is too evident to admit of question."

This sweeping assertion of the strength of the popular demand has been justified by the enormous majority of the votes recently cast in the Senator's own State in approval of the Initiative, Referendum and Recall.

As in all the cases involving Art. IV, §4, this Court has denied jurisdiction, scant consideration has been given to the interpretation and construction of the provision, "the United

States shall guarantee to every State in this Union a Republican form of government."

If in the case at bar this Court should undertake to review the powers, political or judicial, which are conferred by this provision, it is submitted that many statements made *obiter* concerning it, may need explanation and revision. Many important questions yet unconsidered may be or become of supreme importance, which are involved in the terms of

II. The Guaranty.

A. *THE DEMAND FOR THE GUARANTY.*

Quotations could be multiplied to show that the entire direction of the people's thought was toward the protection of national as well as State governments against the return of the tyrannies which they had just thrown off by rebellion.

"In truth," said Jefferson, "the abuses of monarchy had so much filled all the space of political contemplation that we imagined everything Republican, which was not monarchy." Letter to Kerschieval, July 12-1816.

The sole purpose of the guaranty clause was to protect the Union and States against monarchial and aristocratic changes.

Cooley Constitutional Limitations (7th Ed.) p. 28.

"to defend the system against aristocratic or monarchial invasions," says Madison. Federalist, Letter 43.

Patrick Henry cried out against the Constitution, "away with your president; we shall have a king; the army will salute him Monarch!"

Franklin feared that the government would result in monarchy. Elliot's Debates.

From the Philadelphia convention not a word can be cited to show that the fear of an extension of popular sovereignty had any place in the minds of the delegates.

"At this rate," said Nathaniel Gorham of Massachusetts, "an enterprising citizen might erect the standard of monarchy in a particular State; might extend his views from State to State, and threaten to establish a tyranny over the whole, and the general government be compelled to remain an inactive witness to its own destruction." Elliot's Debates, Vol V., p. 333.

"The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but on the other hand, entirely through fear of what might result from the exercise of the power granted to the central government.

South Carolina *v.* U. S., 199 U. S. 457.

B. *HISTORY OF THE GUARANTY CLAUSE.*

The act of the Confederation Congress, April 23d, 1784, contained the precedent for this provision.

Gerry of Massachusetts, Sherman of Connecticut, Spaight of North Carolina, later members of the Constitutional Convention of 1787 voted on the measure giving power to the people of the northwest territory to form governments, and providing "Sixth. That their respective governments shall be Republican."

A later act of the Confederation Congress of July 13th, 1787, contained the same provision.

The history of the progress of Article 4, Section 4, in the Constitutional Convention of 1787 appears from Elliot's Debates, Volume 5, to be as follows:

The measure first appeared in what is known as the Virginia form introduced by Edmund Randolph in this shape,

Art. XI, "Resolved that a republican form of government and the territory of each state except in the instance of a voluntary function of government and territory ought to be guaranteed by the United States to each state." (Page 122)

Later an amended form of the article appeared as follows:

"That a republican constitution and its existing laws ought to be guaranteed to each state by the United States." (Page 182.)

James Madison, Jr., Virginia, moved to substitute, "That the constitutional authority of the states shall be guaranteed to them respectively against domestic as well as foreign violence."

William Churchill Houston of New Jersey objected to perpetuating the existing constitutions, instancing that of Georgia as "a very bad one." (Page 333.)

Edmund Randolph moved to add as an amendment "And that no state be at liberty to form any other than a republican government." (Page 333.)

James Wilson (Pa) moved as a better expression of the idea "that a republican form of government shall be guaranteed to each state and that each state shall be protected against foreign and domestic violence." (page 333.)

Mr. Madison and Mr. Randolph thereupon withdrew their propositions.

The article emerged from the committee on detail as "The United States shall guaranty to each state a republican form of government" etc. (page 381) and the final form was the same excepting for the substitution of the word "every" for "each" and the addition of the words, "in this Union."

C. *WHAT IS THE GUARANTY?*

The word "guaranty" has, and at that time had, a well defined legal significance.

"A guaranty is a promise to answer for the payment of some debt or the performance of some duty, in the case of the failure of another person, who in the first instance is liable."

Kent's Com. (12 Ed.) Vol. IV, p. 121.

"The contract of guaranty is a collateral undertaking. It cannot exist without the presence of a main or substantive liability to which it is collateral. If there is no such substantive liability on the part of a third person either express or implied, that is to say if there is no debt, default or miscarriage, present or prospective, there is nothing to guarantee and hence can be no contract of guaranty."

Brandt on Suretyship and Guaranty, §1, n. 1, p. 5.

This word was not adopted carelessly or without meaning It was clearly distinguished from the later promise of protection, and there is also significance in the fact that the guaranty was to "every State" while the promise of protection was to each. These men long skilled in the framing of their revolutionary documents understood the use of words.

Edmund Randolph, Alexander Hamilton, Gouverneur Morris, Wm. C. Houston, John Rutledge, James Wilson, who debated this article were lawyers, and understood the exact legal meaning of the word "guaranty."

D. *WHO ARE THE PARTIES TO THE GUARANTY?*

A guaranty involves three distinct parties:

1st the promissee, the beneficiary.

2d the promissor, the original obligor.

3d the guarantor, assuring the promissee for the benefit of the promissor.

A guaranty is an agreement not for the interest of the guarantor. The promissee is directly named to wit "every State in this Union;" the original promissor is also included in this category. Each State becomes the original promissor to every State, that it will maintain a Republican form for the benefit of each and every State.

The undertaking of the States themselves under the guaranty clause may be a repetition of the description of the social compact in the Massachusetts Constitution—"the people covenants with each citizen and each citizen covenants with the whole people, &c," which being applied would read, "The States covenant with each State and each State covenants with all the States, &c," and the undertaking of the United States is to guarantee the performance of these covenants.

E. *WHO HAS THE POWER OF INITIATIVE?*

This question must be answered in contemplation of the powers described and reserved in the Constitution of the United States. By Art. 1, § 1, the legislative powers of Congress are confined to the powers "herein granted." Therefore the Congress takes away no powers from the people of the States, except those contained within the pages of the United States Constitution.

But the peoples of the States forced upon the Constitution explicit additional declarations as to the reserved powers of the people of the States. Art. IX declares, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others *retained by the people*," and

Amend X. "The powers not delegated to the United States by the Constitution, *nor prohibited by it to the States* are reserved to the States respectively *or to the people*."

1. A STATE MUST MAKE THE DEMAND.

Clearly only the promisee can demand enforcement and the only promisees under this guaranty are the States.

Judge Story ("Constitution," Vol. II, § 1815) declares that this section of Art. 4 was phrased to prevent the intermedling of the National government with the States, and quotes Mr. Madison as his authority.

George Ticknor Curtis (Const. History of U. S., Vol. 1, p. 363) declares this section to be for the security of the States.

John Randolph Tucker ("United States" Vol. II, § 311) declares that the power of the initiative in the National government would "make this clause, intended for protection, an excuse for destructive invasion."

If the promisees are satisfied how shall the guarantor intervene?

A state will not move unless it regards the offending State as violating republican forms, and it will be guided in making its demand not upon the judgment of the United States but upon its own interpretation of the meaning of republican forms.

It might even be that republican forms were plainly involved, yet a dependance upon the ability of the people to restore them, might prevent another State or even the State itself from asking national interference. The States might not desire to make a demand for enforcement, and if the promisees were all satisfied, there could be no basis for enforcement. It may be a matter of mighty practical importance whether the U. S. can interfere of its own motion in a State's affairs under this Article, and if it cannot it seems to be plain, that another State and not this court has the sole right to judge whether the republican form is involved and whether the United States should be called upon to interfere.

2. A CITIZEN CANNOT DEMAND ENFORCEMENT.

The appellant has no standing in this Court. The guaranty is not to a citizen, but to every State of the Union. Whether the political organization called the State or the people in general is meant to be the object of guaranty is immaterial. The State alone can call for the guaranty.

Later in the article the call for assistance against internal violence is limited to legislature or governor, but when the guaranty is demanded it seems clear that a majority of the people or their recognized representative authority may call for it and none other. No one citizen can appeal even to Congress to enforce this guaranty. A minority would be insufficient and much

less can such an appeal be made by an individual to this court to ignore the recognized course of self-government in any State.

It is notable that the promise to "protect against domestic violence" is a direct promise imposing an original obligation upon the United States. Yet there is a specific limitation upon the persons who can call for the protection.

It would be the very farce of construction should it be held that upon a collateral obligation to states, a private citizen of such state could set the machinery of the national government or of this court in motion against a state.

8% of the voters of Rhode Island form the constituency of a majority of the senators in the Rhode Island Legislature; thus a fraction of over 4% of the voters can block all legislation.

A priori this would be clearly the denial of a Republican form; yet it would be a surprise should one citizen of that State appear here or before Congress to demand enforcement of the guaranty against such forms.

The admission of a private citizen to ask for the enforcement of this guaranty must apply to Congress as well as to this Court. One citizen could always be found to serve the purpose of any cabal, which might wish to turn the armies of the nation into a state to change alleged unrepublican forms. A mere pretence would suffice. Shortly stated: the United States and its departments have no powers under this Article except upon the application of some State of the Union.

The doubts prevailing in 1887 as to the safety of the States against a powerful centralized government emphasize this construction, and the careful safeguards that provide against volunteer "protection" lend strong support.

F. *THE METHOD OF ENFORCEMENT.*

1. BY CONGRESS.

Clearly, this guaranty can only be enforced by the United States, which makes the promise. It is a political obligation.

In the case of new States it has been the practice from the beginning, for Congress to enforce this guaranty by specifically requiring that the Constitution of such State shall be "Republican in form" and "shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." Such is the established formula.

It is inconceivable that the Congress should be recognized in the enforcement of this guaranty against new States, and not be the power authorized to enforce the guaranty against an existing State.

Congress and the President hold the executive machinery; they alone can employ the army and navy, the arsenals and fortifications, the marshals, the militia, the national treasury; all essential to the enforcement of this contract with the States.

Congress and the President are "the United States" in contemplation of our organic forms.

In Congress all interests are represented when the question of Enforcement arises. The respective States have their representatives there to admit or protest.

2. THE REMEDY IS POSITIVE.

The method of executing a guaranty to a State is not to ignore the State and its regular acts until it gets back to the prescribed forms; a positive remedy is involved in the guaranty; a remedy by restoration not by nullification.

The guaranty contemplates an invasion of "republican forms," duly protested by one of the States. The duty of the United States is then to restore those forms.

Presumably the violation of form must be Constitutional or Statutory, and the duty of the government would be to demand a repeal of such provisions and the enactment of proper forms.

A case in point would be a constitutional recognition of heredity in official tenure. The United States could compel a repeal. A self-perpetuating legislature could be deprived of its powers.

Until, however, the United States intervenes, the ordinary operations of government and laws will be recognized.

The guaranty is not that there shall never be in any State forms which are unrepublican, but that if there be such, then upon proper demand of a State, the required forms will be restored.

3. NULLIFICATION OF EXISTING LAWS NOT THE REMEDY.

There is nothing in this section four which suggests that so long as an unrepublican form is *de facto* recognized in the State itself, the enacted laws and settled Constitution are to be nullified. A status is merely created upon which the State is entitled to resort to the United States for the restoration of republican form; till then neither the United States nor this Court can be required or allowed to decide at what point republican forms become inoperative and to ignore the legislative, executive and judicial products of such irregular machinery. If such were the case all the laws of eight States which have utilized the initiative and referendum would be *prima facie* void. Executive acts and judicial findings involving the initiative and referendum would be illegal. No such wholesale nullification is contemlated in a guaranty.

"Among those matters which are implied, though not expressed, is that the nation may not in the exercise of its powers, prevent a State from discharging the ordinary functions of government."

"The Constitution provides that 'the United States shall guarantee to every State in this Union a Republican form of government.' That expresses the full limit of national control over the internal affairs of a State."

South Carolina *vs.* U. S. 199 U. S. 261.

The guaranty shortly stated is: If the States will enter into this compact and create a centralized power through a

contribution of sovereign power by each and all the States, this United States will not impose upon you any unrepublican forms, and if from any source these forms be imposed upon you, we guarantee to restore them; but it cannot be implied that the United States by any department, will *ex mero motu* or in behalf of a private litigant, ignore all the regular acts of a State government which may, in the judgment of the United States, date from the beginnings of unrepublican forms.

4. THE GUARANTY IS OF "FORM" NOT OF PRACTICE.

Colorado has been recently under martial law; yet the utmost which could be demanded was that the United States by its political instruments, should suppress domestic violence upon the request of the legislature or governor.

Had a dictator assumed tyrannical functions, it is submitted that if the Constitution contained the requisite republican forms, the United States could not be called upon to redeem its guaranty, inasmuch as the requisite forms existed and it only remained for the people to insist upon them. While in so insisting the people may require the protection of the United States under the final clause of Article 4, Section 4, the form alone of lawful government is assured by the first clause; anarchy and other unrepublican conditions are only reachable on the constitutional call of the State for protection against domestic violence. If through the established forms the State asks no redemption of the guaranty, practical anarchy is no concern of the United States and certainly not of this court under the guaranty clause.

A fortiori peaceful behests of the majority in Oregon under forms satisfactory to them must be honored by the United States and this court until the guaranty is duly demanded by a State.

B. *JURISDICTION OF THE COURTS.*

1. STATE COURTS.

The Supreme Court of Oregon has decided that the law of which complaint is here made is constitutional and Appellant is not allowed in this court to question the validity of its State Constitution.

"The Constitution of the United States enumerates specially the cases over which its judiciary is to have cognizance, but nowhere includes controversies between the people of a State as to the formation or change of their Constitutions."

"If it be asked what redress have the people if wronged in these matters, unless by resorting to the judiciary, the answer is, they have the same as in all other political matters. In those they go to the ballot-boxes, to the legislature or executive, for the redress of such grievances as are within the jurisdiction of each, and, for such as are not, to conventions and amendments of the Constitution."

Luther *v.* Borden, 7 How. 54.

It is not denied that the legislature had power to repeal the act of which appellant complains, and that appellant has not secured action from this body, which is still open to it to overturn this enactment.

When called upon to review the legality of legal enactments in Texas, this court expressed itself in language well applicable to the case at bar:

"The State (of Texas) is in full possession of its faculties as a member of the Union, and its legislative, executive and judicial departments are peacefully operating by the ordinary and settled methods prescribed by its fundamental law. Whether certain statutes have or have not binding force, it is for the State to determine, and that determination of itself involves no infraction of the Constitution of the United

States and raises no federal question giving the courts of the United States jurisdiction."

Duncan *v.* McCall, 139 U. S. 449.

2. UNITED STATES COURTS.

"It was long ago settled that the enforcement of this guaranty belonged to the political department."

Taylor *v.* Beckham, 178 U. S. 578.

And the court adds that after appeal to the State tribunals "any remedy is to be found in the august tribunal of the people, which is continually sitting and over whose judgment on the conduct of public functionaries the courts exercise no control."

The opinion of Chief Justice Taney in the case of Luther *v.* Borden, (7 How. 1) is one of the monuments of his masterly ability, and with apparent prescience he has covered the issues of jurisdiction here involved. Should his reasoning in that case be not followed and should this Court declare the Constitution of Oregon invalid as here claimed, the political effects might be even farther reaching than those of this great justice's opinion in the Dred Scot case.

With respect to the enforcement of Art. IV, §4, the Chief Justice says:

"Under this article of the Constitution (Art. IV, § 4) it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper Constitutional authority. And

its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."

"It rested with Congress too to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the federal government to interfere."

"But, fortunately for our freedom from political excitements in judicial duties, this court can never with propriety be called on officially to be the umpire in questions merely political. The adjustment of these questions belongs to the people and their political representatives, either in the State or general government. These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination—or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right. There being so different tastes as well as opinions in politics, and especially in forming Constitutions, some people prefer foreign models, some domestic, and some neither; while judges, on the contrary, for their guides, have fixed constitutions and laws, given to them by others, and not provided by themselves. And those others are no more Locke than an Abbe Sieyes, but the people. Judges, for Constitutions, must go to the people of their own country, and must merely enforce such as the people themselves, whose judicial servants they are, have been pleased to put into operation." Mr. J. Woodbury (p. 51) *et seq.*

"Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges would be, that in such an event all political privileges and rights would, in a dispute among the people, depend on our decision finally. We would possess the power to decide against as well as for them, and under a prejudiced or arbitrary judiciary the public liberties and popular privileges might thus be much perverted, if not entirely prostrated. But, allowing the

people to make Constitutions and unmake them, allowing their representatives to make laws and unmake them, and without our interference as to their principles or policy in doing it, yet, when Constitutions and laws are made and put in force by others, then the courts, as empowered by the State or the Union, commence their functions and may decide on the rights which conflicting parties can legally set up under them, rather than about their formation itself. Our power begins after their's ends. Constitutions and laws precede the judiciary, and we act only under and after them, and as to disputed rights beneath them, rather than disputed points in making them."

"The disputed rights beneath Constitutions already made are to be governed by precedents, by sound legal principles, by positive legislation, clear contracts, moral duties, and fixed rules; they are *per se* questions of law, and are well suited to the education and habits of the bench. But the other disputed points in making Constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, and arising not in respect to private rights—not what is *meum* and *tuum*—but in relation to politics, they belong to politics, and they are settled by political tribunals, and are too dear to a people bred in the school of Sydney and Russel for them ever to intrust their final decision, when disputed, to a class of men who are so far removed from them as the judiciary; a class, also, who might decide them erroneously as well as right, and if in the former way, the consequences might not be able to be averted except by a revolution, while a wrong decision by a political forum can often be peacefully corrected by new elections or instructions in a single month. And if the people, in the distribution of powers under the Constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by nor, frequently amenable to them, nor at liberty to follow such various considerations in their judgments as belong to mere political questions, they will dethrone themselves and lose one of their own

invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times."

Mr. Justice Swayne, in dealing with the claim that the Constitution of Georgia was adopted under coercion of Congress, says:

"The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the Judicial is bound to follow the action of the Political Department of the Government and is concluded by it."

White *v* Hart, 15 Wall. 646.

This appellant seems to be the only citizen of Oregon, who is agitated by these alleged unrepublican forms.

The Governor and the Legislature of Oregon report no violent interruptions of their duties; the duly constituted courts of the State have peacably dismissed the appellant's complaints; its senators and congressmen attend in the same building with this court; the attorney-general comes here presumably officially representing the people of Oregon and the State of Oregon, and no one asks to overthrow the established and constitutional forms of that State, save this corporation, a creature of the State, whose very life could be lawfully destroyed by the State of Oregon, before its complaint reached this court.

No other State complains that the guaranties of the United States Constitution are violated. No report has come to Congress and the President, who have the armies of the United States at their back, that the republic has ceased in Oregon and must be restored.

It seems imperative that one question should first be considered and answered by this court, viz:

How will the reversal of this judgment guarantee to the State of Oregon a Republican form of government?

Despite this court's decree, the people of Oregon may continue their system, subject only to the inconveniences which attend specific refusals of this court to recognize the initiative laws as valid.

This court can guarantee only that with every opportunity it will declare initiated acts void—but this will not change the form of government of Oregon. This court's only method of guaranteeing a Republican form (as it may construe such form) is by some positive act, such as sending its marshals to enforce an injunction against voting for such laws.

An injunction would hardly operate upon all the voters of a State, and could not prohibit them from voting as they please.

The marshals who alone can enforce this court's decree, are the officers of the political department, appointed by the President. The President might remove them for making such an effort: Congress having recognized this system as Republican, might take away the appellate power of this court to prevent its interference in such cases. Thus the proposition is emphasized, that the guaranty is for enforcement by the political power, which alone possesses the instruments to enforce its orders. This court in plainly not equipped to enforce this guaranty.

H. *EFFECT OF JUDICIAL DECREES.*

1. THE NULLIFICATION OF INITIATED LAWS.

The only operation which a decree of the court could have would be to outlaw the State of Oregon, at least so far as its Constitution, laws and institutions are based upon "initiative" proceedings.

The court could upon any appeal from the courts of Oregon, refuse the enforcement of judgments based upon such enactments. In the eyes of this court such constitutions and laws would be void *ab initio*. If they were not void *ab initio* this appellant has no standing.

The following Constitutional Amendments and Acts were enacted last year at the polls in Oregon on initiative petitions:

Constitutional Amendments.

For the regulation of taxation by counties.

Giving cities and towns power to license or prohibit the sale of liquors.

Providing jury verdicts of three-fourths, separate summonses for grand and petty juries, regulating retrials, fixing terms, increasing jurisdiction of Supreme Court, and fixing tenure of judges.

Extending debt limit for counties for road making purposes.

Acts for

A tax to support a Normal School.

Amendments of Direct Primary law and corrupt-practices' act.

Fixing employers' liability.

Prohibiting taking of fish.

Are these laws organic and functional void *ab initio?* The appellant can only stand upon that ground with respect to the tax imposed upon him.

As a judgment in its favor must be on the ground of the unconstitutionality of the method of making the law, it would require no further judgment of this court to nullify all laws, institutions, taxes, territorial divisions, judicial proceedings, etc., which in ten different States may have been established by this same method.

If the people have no right to propose laws without the intervention of a legislature, it would seem to follow that they cannot alter their constitutions by the same method: the two propositions are inseparable.

2. CONFLICT WITH CONGRESS.

Congress and the President have already after full discussion admitted to the Union the State of Oklahoma and agreed to admit the State of Arizona, under Constitutions containing provisions for the initiative on Constitutional amendments and statutes, which follow almost in exact words the Oregon amendment.

For more than a century this Court has recognized the power of Congress to determine whether the Constitutions of States applying for admission to the Union are republican in form. It cannot be that a different department of the government is to decide upon the republican forms of States already in the Union. The very proposition involves an irrepressible conflict.

Certainly Oklahoma and Arizona have no greater rights in the Union than has the State of Oregon. And if this Court should now declare the Constitution of Oregon to be unrepublican, it cannot avoid a like decree against Oklahoma and Arizona. That Congress would assert its rights and defend with its political power the legality of the Constitutions, which it has expressly approved, is unquestionable. It would likewise extend its protection to Oregon, Maine, Missouri, South Dakota, Nevada, Utah, Montana, Arkansas and California.

If Congress thus recognizes these Constitutions, it is clear that the other States must give full faith and credit to the public acts, records and judicial proceedings of these States, and this Court would be the only tribunal to ignore or deny their Constitutional regularity.

Such a conflict is inconceivable; yet it would be opened if this appellant should prevail.

This Court might impede by its decrees the operations of Statehood, but it is plain that only Congress could enforce the guaranty to which the United States has pledged itself.

(As to the proceedings for the admission of Oklahoma and Arizona, see *infra* III B, 2, a. and b.)

Chief Justice Taney in Luther *v.* Borden gave the logical forecast of such a conflict between the judicial and political departments in these words:

"After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the Court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the Court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government, which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order."

III. The Basis of Construction and Interpretation.

A. *THE GENERAL RULES.*

It is submitted that in construing and interpreting Art. IV, § 4 there must be a material departure from the rules ordinarily applied to the Constitution of the United States.

National powers were acquired by delegation of sovereignty from the people of the States. When the limits of these powers are in question it is a proper and necessary inquiry what the people of the then existing States intended to delegate to the United States. The national powers cannot be extended beyond what were then intended to be conveyed. Hence the minute inquiry into the interpretation then put upon the Constitution. It would seem that even in this inquiry the opinions of those who comprised the convention, which framed the Constitution, are given too much weight,

inasmuch as the meetings were secret and these opinions were not known to the people. The debates before the people and in the ratifying conventions would seem to be entitled to greater weight, as they may be taken to have fairly expressed the opinions of the people whose consent gave effect to the instrument.

But we deal now with a different case, viz., a provision of guaranty, which is for the benefit of the States and in which the States, not the United States, are the interested parties. The guaranty was not designed to deprive the States of any sovereign powers not expressly delegated in the national constitution, and the X. and XI. amendments emphasized this fact.

Hence, not only, as has been heretofore submitted, are the States alone entitled to call for the enforcement of the guaranty, but the prevailing opinions of the States become of dominating importance in determining what is a "republican form." If the States are content with the present forms of the State governments there can be no call for the guaranty.

Hence it is submitted that present public opinion is the foremost test in construing this guaranty.

Next in importance seem to be the precedents established by Congress, which is invested with power to admit new States, and therefore from time to time establishes the forms, which, like those of the original states, cannot be impeached.

Any opinions of the courts not in conflict with the above two standards should next be considered.

But there are also, it is submitted, certain irrevocable standards of the past, which even present opinion cannot exclude.

First among these are the forms of free government which were known to the Colonists, when they were permitted to exercise sovereignty. Any free forms practiced by the Colonists cannot be excluded from the category of "Republican forms."

The second irrevocable standard must include any form, which was recognized as Republican, when the Constitution was framed. So far as there was agreement upon fundamental principles, we must accept any forms which, within the fundamental

principles were comprehended in the extremes of opinion of that day. As Hamilton and Jefferson agreed that popular sovereignty must always be maintained, any "form" which was within the purview of the schools they represented must be accepted as "Republican."

Next in importance would seem to be the popular judgment in 1887.

Finally would come the secret statements in the Constitutional Convention.

These then are the standards of Construction, suggested, in the order of relative importance.

1st Present public opinion.
2d Congressional precedents.
3d Opinions of the courts.
4th Historic Democratic Forms.
5th Extremes in contemporaneous opinion.
6th Public opinion in 1887.
7th Statements in Constitutional Convention.

Hence consideration is asked to

B. *THE STANDARDS BY WHICH THE GUARANTY IS TO BE CONSTRUED.*

1. PRESENT PUBLIC OPINION.

The views above expressed as to the primary importance of present public opinion are the justification for the full statement made above (under I, B and C) of the present status of the Initiative and Referendum in the various States. It may be assumed that "whatever is" is at least intended to be Republican, as the standards of liberty have not been lowered in

the last century. This basis of construction is suggested by the expressions of Mr. Justice Holmes in his dissenting opinion in

Opinions of the Justices, 160 Mass. 587.

"— in construing the Constitution we should remember that it is a frame of government for men of opposite opinions and for the future, and therefore not hastily import into it our own views or unexpressed limitations derived merely from the practice of the past."

Thomas Jefferson said of Constitutional changes (Works, Vol. VII, p. 14):

"Forty years of experience in government is worth a century of book reading—

I know also that laws and institutions must go hand in hand with the progress of the human mind. As—manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the times."

The sovereignty of the people found expression in Lincoln's first inaugural address:

"This country with its institutions belongs to the people who inhabit it."

In Martin *v* Hunter's Lessee, 1 Wheat. 327., the court says:

"It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter (U. S. Constitution), and restrictions and specifications which at the present, might seem salutary, might in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms."

Of all the terms used in the Constitution "Republican form of government" is the most general.

It swept into meaning and significance all the free forms of the past, the then existing conceptions, and the possible develop-

ments in free government for generations, perhaps centuries, to come. The term has, and was intended to have, infinite elasticity.

James Wilson of Pennsylvania, was the greatest Republican in the Constitutional Convention. As a Justice of this court he gave a definition of Republican government, which was good for that day and will remain good to the end of time:

"My short definition of such a government is one constructed on this principle, that the Supreme power lies in the body of the people."

Chisholm *v* Georgia, 2 Dall. 457.

Within this circle of popular sovereignty forms may revolve, cross, intertwine, shift, live and die. It excludes absolutely the idea that forms are confined to those which existed when the Constitution was framed.

Little was then known of popular government save in the memory of early colonial days, in the revolutionary fabrics of the States and the tottering Confederation.

The States had just formed their Constitutions, and free governments had not existed in the colonies since the Stuarts had committed them to the control of the privy council near the end of the 17th century. The only original conception which the revolution created was that of the sovereignty of the people. The framers of constitutions had fluctuated between royalty and Democracy: there were Hamiltons and Jeffersons. The republic was an experiment; doubts applied to every feature of the new forms. It was the uncertainty of infancy, which only age and experience could abate. To say that these experimenters with newly formed ideas were to determine for all time what constituted a republican form, would be to bind posterity to the crude notions of republican childhood.

When the secret ballot has been discovered as the true record of a nation's will must we be limited in its use to the

notions of our ancestors to whom the ballot was an untried tool?

Are the experiences of a simple colonial yeomanry to guage our armament against giant monopolies and legislative corruption?

The railroad, telegraph and telephone have multiplied a hundred fold the possibilities of Democratic co-operation.

The daily press and multitudinous magazines of to-day cannot take the same place in our horizon with the scattered pamphlets of the revolutionary period.

It would be a block in the way of human progress if this court should plant itself upon the conditions and conceptions of our forefathers in the constitutional conventions, and say to each of 46 sovereign States "Thus far shalt thou go and no farther."

The Constitution of Oregon embodies the progress and development of our institutions; it is the first working model of an ideal form in which "the supreme power lies in the body of the people."

2. CONGRESSIONAL PRECEDENTS.

Should this Court undertake to declare invalid the terms of the Oregon initiative amendment, there will be established two different standards of Republican government: one will have the sanction of the Congress and President, the other of this Court. Under its recognized power Congress has admitted Oklahoma to this Union and given its consent to the admission of Arizona.

These two States have in their Constitutions, almost in the same words, the initiative and referendum forms of Oregon. It is not a parallel, it is an essential identity. (See ex parte Wagner, 21 Ok. 35). It is submitted that such action of the political power is determinative of this case.

a. *ADMISSION OF OKLAHOMA.*

The enabling act of Congress for the admission of Oklahoma (U. S. S. at Large, Ch. 3335; Act June 16th, 1906).

§ 34—Provides for submission of the Constitution to the people. "And if the Constitution and government of said proposed State are Republican in form &c., it shall be the duty of the President of the United States"—to issue his Proclamation announcing the result of said election and thereupon the proposed State of Oklahoma shall be deemed admitted by Congress into the Union, &c.

The Congressional Record teems with attacks and defences of these Direct Legislation provisions and the decision of Congress was made deliberately in their favor. It is matter of notoriety that in the year following there was much doubt expressed as to the acceptance of the Constitution by President Roosevelt. Mr. Taft, then Secretary of War, was supposed to have been the representative of the President in addressing the people of Oklahoma and criticising the provisions for the Initiative and Referendum. That the people of Oklahoma had strong reasons to believe that their Constitutional provisions would meet with executive opposition, appears in the opinion of C. J. Williams in Ex parte Wagner, 21 Ok. 35.

The Court thus explains the history of the omission of the self-executing clause of the direct-legislation provisions in the Oregon Constitution.

"Such self-executing provisions were in the original form which was provided to be submitted to the people; but the convention reassembled "in order to obviate any possible objection that might be made by the President of the United States to the same, wherein it was required by §4, Art. IV, Constitution of the United States and the terms of the enabling act to be Republican in form, and not in conflict with the provisions of said act, that part was eliminated, leaving it to the legislature to

carry same into effect. Until the legislature created measures carrying it into effect, the Federal government had less right or reason to complain."

The decision was deliberately and finally made as follows:

By proclamation (U. S. St. at Large, Vol. 35, pt. 2, p. 2160), Nov. 16, 1907, President T. Roosevelt declared that the Constitution adopted by the people had been certified to him "And whereas it appears that the said Constitution and government of the proposed State of Oklahoma *are republican in form*, &c., and said Constitution" is not repugnant to the Constitution of the United States or to the principles of the Declaration of Independence, &c. "the State of Oklahoma is to be deemed admitted by Congress into the Union under and by virtue of the said Act (June 16th, 1906) on an equal footing with the original States."

Signed "By the President, Elihu Root,
Secretary of State."

b. *ADMISSION OF ARIZONA.*

The enabling act for the admission of Arizona (U. S. S. at Large, Ch. 310, June 20, 1910) provided

§20.—"The Constitution shall be *Republican in form* and make no distinction in civil or political rights or account of race or color and shall not be repugnant to the Constitution of the United States and the *principles of the Declaration of Independence.*"

Congress provided for definite limitations upon the future powers of Constitutional amendment, "by an ordinance irrevocable without the consent of the United States and the people of said States" touching religious freedom, polygamous marriages, sale of liquor to Indians, disclaimers to public lands, equality of taxation, taxing Indian lands, assumption of territorial

debts, public schools, right of suffrage, &c.—which shall be made part of such Constitution in terms to preclude later amendment "without the consent of Congress."

It was open to Congress to make like reservation with respect to amendment striking out direct legislation, but it was not done.

By these reservations it appears also that this Constitutional contract with the U. S. was to be made with Congress, showing that the political power is recognized in the execution of such agreements.

The same act

§ 21 (Ch. 310, 1910) provides for submission of the Constitution proposed by the State convention to the people.

§ 22. "And if Congress and the President approve said Constitution the President shall certify said facts to the governor," &c.

§ 23. On election of State officers the President shall "issue his proclamation" and thereupon "the proposed State of Arizona shall be deemed admitted by Congress into the Union by virtue of this act on an equal footing with the other States."

The debates in Congress show that Congressional opposition to direct legislation had practically ceased.

It is public knowledge that the veto of the President was confined to the "recall" provisions of the Constitution and following this veto Congress amended the terms of admission by act approved Aug. 21st, 1911 so that "Arizona is admitted as a state upon amending the proposed Constitution (Art. VIII, § 1) adopted by the electors at the election held Feb. 9, 1911—so as to except members of the judiciary from the *recall* provision."

c. *THE REAPPORTIONMENT ACT.*

But an act of Congress of even greater significance has recognized the legal status of those State Constitutions, which contain provisions for direct action by the people under the Initiative and Referendum.

House Report No. 2983, 1911, provided for the redistricting of States for representation in Congress by customary legislative acts. This bill was amended in the Senate, Aug. 3d, 1911, and became a law in the following form (Acts Aug. 8th, 1911.)

"§34. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other representatives by the districts now prescribed by law until such State shall be *redistricted in the manner provided by the laws thereof*, &c."

This amendment was expressly intended to leave the redistricting subject to the Initiative and Referendum in States where they have been adopted.

Thus provisions for direct legislation have become a part of the political system of the United States, and the legality of future Congresses may be dependent upon a like recognition by this court.

3. OPINIONS OF THE COURTS.

This Court has in a sweeping statement confirmed the title of the people of Oregon to shape its government to their own free will:

"The powers of the States depend upon their own Constitutions: and the people of every State had the right to modify and restrain them, according to their own views of policy or principle."

Martin *v* Hunter's Lessee, 1 Wheat. 305.

The Supreme Courts of Oklahoma and Oregon have affirmed the validity of Direct Legislation in ex parte Wagner, 21 Ok. 35, and

Kadderly *v* Portland, 44 Oregon 118.

In the latter case Justice King for the Court erected an impregnable standard for the Republican form:

——"each republic may differ in its political system, or in the *political machinery* by which it moves, but so long as the ultimate control of its officials and affairs of State remains in its citizens it will in the eye of all republics, be recognized as a government of that class."

Kiernan *v* Portland, 111 Pac. Rep. 379.

So the Minnesota Supreme Court holds

"The test of Republican or Democratic government is the will of the people, expressed in majorities under the proper forms of law."

See also Hopkins *v* Duluth, 81 Minn. 189.
See also In re Pfahler, 150 Cal. 77.

Much reliance has been placed by opponents of direct legislation on the case of

Rice *v* Foster, 4 Harr. 479,

which contains language unworthy of an American Court and has very properly come under severe criticism.

Mr. Justice Holmes, in the opinions of the Justices, 160 Mass. 587, refers to the theory of Hobbes that the surrender of sovereignty by the people was final, and calls attention to the fact that the notion of Hobbes was urged in the interest of the absolute power of King Charles I., and thus disposes of the case of Rice *v* Foster:

"I notice that the case from which most of the reasoning against the power of the legislature has been taken by later decisions states that theory from language which almost is borrowed from the Leviathan."

4. HISTORIC DEMOCRATIC FORMS.

It must be that in using the general term "Republican Form of Government," it was intended to include beyond peradventure such preceding free forms as were known to the people of the States when they adopted the Constitution. Such indeed furnished the only basis upon which the people could construe the term. If such precedents were to be excluded the submission of the constitution to the people was in this regard a snare.

Hume, Rousseau, Locke and Kant had then spread the doctrine of popular sovereignty through the world, and their works and theories were well known to the colonists. Paine and Jefferson were expounders of this doctrine in America. Locke had attempted to put his theories into concrete form in the charter for Carolina. Rousseau's "Social Contract" was already imbedded in words in the Massachusetts Constitution. He had definitely challenged the representative system (Ch. XV.) in the words:

"Every law which the people in person have not ratified is invalid."

From these writers the Colonists had absorbed the extreme ideas of Democracy. Democracy flowed in their Teutonic blood, was imbedded in their town and colonial governments, and was the hope and inspiration of their revolutionary struggle.

"Representatives," "delegates," meant to them rulers and not servants. Their numerous democracies in the shape of towns had not in a century and a half yielded up even to the argument of force one jot of their purity. They exist to-day as lasting monuments of the truth, that the ultimate destiny of human freedom is pure Democracy, the direct expression of the popular will in the exercise of sovereignty.

Democracy, and not a representative system, was the ideal of the colonists.

A. *TEUTONIC ORIGINS.*

"The political instincts of a race have their origin in a prehistoric age." In their "force and persistence we discern—the tendency displayed in kindred nations to preserve in their governments the essential features of the primitive political institutions of the race to which they belong."

Stevens Sources of Const. of U. S., p. 3.

Nothing in history has proved its vitality more definitely than the Teutonic idea of direct popular government. It survived the Roman influences in Switzerland, and in England the Norman conquest. It is embedded in Magna Charta, in the English vestry and county, and on the new soil of America burst forth in its primitive purity and strength. Where this idea has held its force, freedom to-day appears in most perfect form; in Switzerland the volkmoot of Uri, Schwiz and Unterwalden has found expression in the Cantonal and Federal Constitutions; in England it is now asserting its dominion over feudal privileges in the deposal of the House of Lords and the destruction of land monopoly; in Australia and New Zealand popular government has taken on progressive forms, and Canada is advancing in like direction. In the United States it asserts itself over the mixed bloods and imported citizenship. As between the upper and the nether millstone it grinds all races into food for liberty, and now before this Court asks recognition of the final step in asserting the sovereignty of the people.

Back in the earliest records of Teutonic practices we find pure democracy, changed only in form of expression by the Constitution of Oregon.

Tacitus ("Manners of the Germans," § XI) describes the political gatherings of the ancient Teutons:

"No man dictates to the assembly; he may persuade but cannot command. When anything is advanced not agree-

able to the people, they reject it with a general murmur. If the proposition pleases, they brandish their javelins."

The historian McCracken (History of Switzerland, p. 35) expresses surprise "that it has escaped notice of historians that through Alamannian invasion of Helvetia and Great Britain by Saxon and English tribes, Switzerland and England (and her colonies!) have retained Teutonic institutions in greater purity than all the other States founded by Teutonic races."

"The first Swiss confederation entered history in 1291 when the small peasant communities, Uri, Schwiz and Unterwalden concluded a pact to defend themselves against the encroachments of the nobility." (McCracken, p. 6.)

These communities were pure democracies, and at the present day they retain the Landes gemeinde (popular assembly) as their legislative body, in form unchanged from the earliest days of their recorded history.

Kemble (Saxons in England, 236, 237) remarks:

"The Teutons certainly did not elect their representatives as we elect ours (in England) with full power to judge, decide for, and bind us, and therefore it was right and necessary that the laws, when made, should be duly ratified and accepted by all the people."

So—"The whole principle of Teutonic legislation is, and always was, that the law is made by the Constitution of the King and the consent of the people; and —one way in which that consent was obtained was by sending the capitula down into the provinces and shires and taking the 'wed' (pledge) —in the shire moot."

The original form of government in Saxon England was the Folksmoot (assembly of the people) and it was only under the stress of wars and the aggregation of the petty kingdoms or shires into the great heptarchic kingdoms, that the Folksmoot gave way to the Witangemot in the nation and survived only in the shires.

Kemble (Saxons in England, II, pp. 191–194) points out how impossible it was for the whole of a large people to attend upon the meetings, leaving their farms, while the leaders could easily do so, following the King. "Thus it appears to me by a natural process did the Folksmoot, or meeting of the nation become converted into a Witangemot or meeting of councillors."

History records the survival of democratic forms in England which filled the minds of the puritans, who left their native land and sought on inhospitable soil, the right to govern themselves according to their free will. They knew the parish had never ceased to be democratic: John Calvin had filled their minds with the doctrine of common consent, and the covenants of the people in England, Scotland and Ireland were the exemplars from which the Pilgrims formed their Mayflower compact of self-government. The Guilds were democratic in their form and administration, and the church congregations were miniature republics.

But these conditions in the mother country cannot be extended here.

Consult Kemble, Saxons in England; Stubbs, Constitutional History of England; Freeman, Growth of the English Constitution; Campbell (Douglas) Puritan in Holland, England and America; Hosmer, Anglo Saxon Freedom; Prof. Vincent, Government in Switzerland; Lowell, Governments and Parties in Continental Europe; Taylor, Constitutional History of England.

B. *COLONIAL PRECEDENTS.*

The Colonial Charters conferred in most instances Democratic powers. Even the proprietary governments had such form.

Carolina was invested with powers of government "with the assent, advice and approbation of the freemen of the Colony."

In Maryland's charter to Lord Baltimore a like provision was made, and later fundamental law gave power to the legislative assembly "as if the freemen were personally present."

William Penn was invested with powers of government "with the advice and assent of the freemen."

In the first year of the government devised by him "the general assembly was to consist of the whole number of freemen."

Pitkin's History of United States, pp. 57, 55, 56, 65, 16.

1. NEW HAMPSHIRE.

Albert S. Batchellor (Government and Laws before the Establishment of the Province) states that the grants to John Mason by the Council for New England (pp. 16, 17) included the towns of Exeter, Portsmouth and Dover, which were not only governed by direct vote of the people, but the first union of these towns (1637) under the name of "combination for local government," was upon the Democratic method (p. 23), and existed until the compact of union with Mass. Bay, 1641 (p. 23).

2. MASSACHUSETTS BAY.

The grant of the Council for New England of 1627–8, to John Endicott and five others was enlarged by the royal charter of 1629–30 to the Governor and Company of the Mass. Bay in New England."

The whole body of freemen was empowered to elect the officers and it was "by the general vote of the people and the erection of hands" that the law making power was (Oct. 19, 1630) first conferred upon the officers elected.

While the people of this Colony adopted the delegate system earlier than those of New Plymouth, the actions of the General Court were regulated upon purely Democratic lines until 1643 when the New England Confederation was formed.

The initiative of laws by a standing committee was provided in 1638 that their work might "bee psented to the Generall Court for confirmation or reiection, as the Court shall adjudge."

(Records of Mass. Bay, Shurtleff's Ed. page 22.)

Attendance of the freemen at the General Court was compulsory, but by enactment of the general court in 1635 (records of Mass. Bay, page 166) "the towns of Ipswch, Neweberry, Salem, Saugus, Waymothe and Hingham shall have libertie to stay soe many of their ffreemen att home, for their safety of the towne, as they judge needefull, & that the saide ffreemen that are appoyncted by the towne to stay att home shall have liberty for this Court to send their voices by pxy."

3. PLYMOUTH COLONY.

The Plymouth Compact was made Nov. 11, 1620, and is a covenant of Democracy:

"We—do—covenant and combine ourselves together into a civic body politick, for our better ordering and preservation and furtherance of the ends aforesaid: and by virtue hereof, do enact, constitute and frame such just and equal laws, ordinances, acts, constitutions and officers, from time to time, as shall be thought most meet and convenient for the general good of the colony; into which we promise all due submission and obedience." Signed by 41.

The Compact, Charter and Laws of the Colony of New Plymouth (1836), p. 19.

The first laws of the Colony of New Plymouth were made in 1623 (p. 28) in full court (p. 29).

The act of January, 1632 begins: "It was enacted by public consent of the freemen of this society of New Plymouth, etc." (p. 30).

A form of government adopted Nov. 15, 1636, recited that "No imposicon law or ordnance be made or imposed upon or by ourselves or others at present or to come but such as shall be made or imposed by consent according to the free liberties of the State and Kingdome of England and no otherwise" (p. 36). The election of governor and seven assistants was "to be made only by the freemen according to the former custome" (p. 37). As to laws "that the lawes and ordnances of the Colony and for

the government of the same be made onely by the freemen of the corporation and no other" (p. 42).

It was at a general meeting of freemen that in 1638 (p. 63) it was enacted as follows:

"Whereas complaint was made that the freemen were put to many inconveniences and great expences by their continuall attendance at the Courts, it is therefore enacted by the Court for the ease of the severall Colonies and Townes within the government, That every Towne shall make choyce of two of their freemen and the town of Plymouth of foure, to be Committees or deputies to joyne with the Bench to enact and make all such lawes and ordinances as shall be judged to be good and wholesome for the whole, provided that the lawes they doe enact shall be propounded one Court to be considered upon till the next Court, and then to be confirmed, if they shal be approved of *except the case require present confirmacon*, And if any act shall be confirmed by the Bench and Committees which upon further deliberacon shall prove prejudiciall to the whole, That the freemen at the next Eleccon Court after meeting together *may repeale the same and enact any other usefull for the whole.*" (Here is emergency legislation and the referendum and initiative retained in the body of the freemen).

In 1646 it was Enacted by the Court:

"Whereas the Townes formerly were to send their deputies (which must arise out of their freemen) to attend the three Generall Courts of the yeare, for our Soveraigne Lord the Kinge, now upon the speciall complainte of the deputies of the Townes so sent professinge them to be oppressed thereby, it is ordered and enacted that the whole body of freemen appeare at the Election Courte, which is the first Tuesday in June successively, and there to make or repeale such lawes orders and ordinances as shall be founde meete and wholesome for the orderinge of the government, and that then alsoe they present such deputies as have bene chosen by their townes accordinge to order formerly established who are to attend the same, and its severall

adjournments as the occasions of the Country shall require, and that whatsoever lawes orders and ordinances shall be made or repealed be at that Courte and the severall adjournments thereof onely done and the other Courts to attend onely matters of Judicature and the magistrates onely to attend the same." p. 88.

Apparently the delegation of legislative powers had proved unsatisfactory and thereupon such powers were withdrawn from the deputy courts and the enactment of laws was restored exclusively to the whole body of the freemen at the election Court in June. The first experiment in delegation of legislation was a failure.

1658 the laws of the Colony were revised and published. The revision begins (p. 107):

"Wee the Associates of New Plymouth coming hither as freeborne subjects of the state of England indowed with all and singulare the privilidges belonging to such being assembled doe ordaine constitute and enacte that noe acte imposition law or ordinance bee made or imposed upon us att prsent or to come but such as shal bee made and imposed by consent of the body of the Associates or theire Representatives legally assembled, which is according to the free libertie of the State of England."

The same clause was enacted in general laws 1671 (p. 241)

4. RHODE ISLAND.

The early life of the colonists of Rhode Island was under a pure democracy. The colonists of Providence in 1636 (records of the Colony of Rhode Island, Vol. 1, page 14) declared their obedience "to all such orders or agreements as shall be made for public good of the body in an orderly way by the major consent of the present inhabitants, masters of families incorporated together in a towne fellowship and others whom they shall admit unto them only in civil things."

The town of Portsmouth in 1638 by compact underwritten by the inhabitants (records of the Colony of Rhode Island,

Vol. 1, page 52) submitted themselves "to the King of Kings and Lord of Lords and to all those perfect and most absolute lawes of his given us in his holy word of truth, to be guided and judged thereby."

Not only were the freemen of Portsmouth the makers of the laws but (Records of the Colony of Rhode Island, Vol. 1, 57) penalties were imposed upon those who "shall not repair to the publick meetings to treate upon the publick affairs of the Body upon publick warning (Whether by beate of the Drumm or otherwise) if they fayle one quarter of an houre after the second sound, they shall forfeit twelve pence; or if they depart without leave they are to forfeit the same summ of twelve pence."

Not only did the towns of Rhode Island thus independently practice a democratic system, but a general court, legislated for the united towns of Newport and Portsmouth and in 1641 (Records of the Colony of Rhode Island, Vol. 1, page 112) a democracy was declared in the following words:

"It is ordered and unanimously agreed upon, that the Government which this Bodie Politick doth attend unto in this Island, and the Jurisdiction thereof, in favor of our Prince, is a *Democracie* or Popular Government; that is to say, It is in the Powre of the Body of Freemen, orderly assembled or the major part of them, to make or constitute Just Lawes, by which they will be regulated, and to depute from among themselves such Ministers as shall see them faithfully executed between Man and Man."

Thus we have independent compact of the towns united in a purely democratic system recognizing only laws made by themselves based upon "the holy word of truth."

Not until 1643 (Records of the Colony of Rhode Island, Vol. 1, 143) was the charter of the Colony of Rhode Island granted bearing the name of "The Incorporation of Providence Plantations in the Narragansett Bay in New England."

This was a democratic charter giving to the inhabitants (Records of the Colony of Rhode Island, Vol. 1, p. 146) "full power and authority to rule themselves, and such others as shall hereafter inhabit within any part of the said tract of land by such a form of Civil Government *as by voluntary consent of all, or the greater part of them*, they shall find most suitable to their estate and condition."

Under the terms of this instrument, the people of Providence, Newport, Warwick and Portsmouth met in "general court" in May 19th, 1647. They proceeded to enact a perfect form of the initiative and referendum in the following remarkable terms (Records of the Colony of Rhode Island, Vol. 1, 148, 149).

"II. It is ordered, that all cases presented, concerning General Matters for the Colony, shall be first stated in the Townes, Vigd't, That is when a case is propounded . . . The Towne where it is propounded shall agitate and fully disscus the matter in their Towne Meetings and conclude by Vote; and then shall the Recorder of the Towne, or Towne Clerke, send a coppy of the agreement to every of the other three Townes, who shall agitate the case likewise in each Towne and vote it and collect the votes. Then shall they commend it to the Committee for the General Courte (then a meeting called), who being assembled and finding the Major parte of the Colonie concurring in the case, it shall stand for a Law till the next Generall Assembly of all the people, then and there to be considered whether any longer to stand, yea or no: Further it is agreed, that six men of each Towne shall be the number of the Committee premised, and to be freely chosen. And further it is agreed, that when the General Courte thus assembled shall determine the cases before hand thus presented, It shall also be lawful for the said General Court, and hereby are they authorized, that if unto them or any of them some case or cases shall be presented that may be deemed necessary for the public weale and good of the whole, they shall fully debate,

discuss and determine ye matter among themselves; and then shall each Committee returning to their Towne declare what they have done in the case or cases premised. The Townes then debating and concluding the votes shall be collected and sealed up, and then by the Towne Clarke of each Towne shall be sent with speed to the General Recorder, who, in the presence of the President shall open the vote: and if the major vote determine the case, it shall stand as a Law till the next General Assemblie then or there to be confirmed or nullified."

Historians (see remarks of Amasa M. Eaton, Harvard Law Review, XIII, 584, Arnold, History of Rhode Island, Vol. 1, pp. 203–204) regard this act as a genuine instance of the popular initiative and referendum.

In 1650 the general court gave its powers to a representative committee consisting of 6 from each town, (Records of the Colony of Rhode Island, Vol. 1, pp. 228, 229) and provided for the popular ratification of laws enacted by such committee by the sending of the same to the towns taking their vote thereon which, if unfavorable, should nullify such laws. This was the compulsory referendum in its purest form.

A similar referendum appears in (Records of the Colony of Rhode Island, Vol. 1, pp. 401, 402) and by later provision of the general court, (Records of the Colony of Rhode Island, Vol. 1, page 429,) the majority votes of the entire colony were required for the approval or disapproval of the law instead of the majority of those in each town.

In 1760, the Colony of Rhode Island was a pure democracy in the ancient form of a Folkmoot in which all the public freemen voted.

5. CONNECTICUT.

The settlement of Connecticut was occasioned by the dissatisfaction of certain colonists with their share in the government of the colony of Massachusetts Bay and in 1636 the inhabitants of three towns, (Johnston, History of Connecticut,

pp. 24, 25) migrated in order that they might enjoy a larger liberty in civil affairs.

(See Lobingier, The People's Law, McMillan, 1909 which work contains a comprehensive and able analysis of the democratic institutions of the United States.)

It has been claimed by the historian, Alexander Johnston that "the birthplace of American Democracy is Hartford," (Johnston's Conn. preface p. VIII).

Three years after their settlement, the inhabitants of Windsor, Wetherford and Hartford met in mass convention and formed "one Publike State or Comonwelth". (Colonial Records of Conn. Trumbull's Ed. p. 21).

The agreement is known as the "Fundamental Orders" of 1639. It has been called and is perhaps entitled to be called the first written constitution known in history and is certainly the first which represents the idea of the sovereignty of the people.

Lobingier, p. 90,
Fiske, Civil Government, 192
Johnston, Conn. 63.

The instrument was adopted by the entire body of the freemen and no longer contained any appeal to the sovereign in its enacting clause, but was a direct announcement from the people, "it is ordered, sentenced and decreed."

This instrument had been previously prepared and was adopted as prepared and therefore contains the two essentials of modern constitution making, namely, the preparation of a draft and the popular ratification. Likewise when this instrument was amended, the ratification by the people was required. (Colonial Records of Conn., Vol. 1, p. 140 and 347).

6. THE TOWNSHIPS.

From the landing of the Pilgrims to the time of the Constitutional convention, the town meeting was the unit of popular action in New England. It was the purest form of Democracy,

and was never abandoned except when larger growth compelled a delegate form for cities. The Colonies were obliged to yield to this necessity, but their constituent towns were enduring democracies. Plymouth town has not for a year yielded up this form and the same is true of all other towns to this day. When the Constitution was framed the towns elected the delegates to the ratifying conventions and in numerous cases instructed them as to their action. Lobingier, Peoples Law, p. 188 and 189.

Many towns framed amendments upon which their delegates were to insist.

The towns of New England were as distinct entities within their colonies and States, as were the States under the Confederation and Constitution.

The Stuart ministries were able to impose their governors upon the Colonies as Federalized governments, but as has been well stated the latter "in respect to their municipal rights and privileges were so strongly intrenched in the New England town system that they were practically impregnable." Batchellor, Government and Laws of New Hampshire, p. 36.

From the date of the new Charter (1671) to the Declaration of Independence the law-making power of the Colonies was limited, and the only autonomy was in the towns. As revolutionary States the Colonies of New England were aggregated towns, pure democracies, the real seat of government.

In Massachusetts the Township has always been a political unit, endowed with legislative powers.

By act of the general court of Massachusetts Bay, 1636, it was ordered that "the freemen of every town or a major portion of them . . . make such laws and constitutions as concern the welfare of their town . . . not of a criminal but of a prudential nature."

The call for the convention to frame the Constitution of Massachusetts was issued upon returns from the towns demanding a convention; the towns were requested to send dele-

gates and such constitution was not to be promulgated until the instrument was laid before the "respective towns and plantations" for approval or disapproval by two-thirds of the citizens. Journal of Convention, p. 5, 1779.

The Democratic towns thus took the initiative in the framing of the constitution and held control through the right of ratification.

Such were the Democratic institutions which were cherished in the memory of the Colonists.

When they by violence shook off the Soveignty of the King these were the traditional forms. It is inconceivable that in forming their States and a National Constitution these were not the most precious shapes of government, which they contemplated and which they wished to perpetuate in their exercise of sovereign power.

5. EXTREMES IN CONTEMPORANEOUS OPINION.

The importance of public opinion in the construction of the National Constitution is apparent when we consider that Alexander Hamilton took but small part in the Constitutional Convention, and Jefferson was not a member. Samuel Adams, John Adams, Patrick Henry and other great patriots were not in the convention.

It was indeed in the debates on ratification and in contemporaneous discussions that the real test of popular opinion is to be found. Jefferson and Adams objected that the rights of the people had not been sufficiently guarded, and the ten articles of amendment served as a rebuke to the indifference of the National Convention as to fundamental popular rights.

The two great men, who were then and are now recognized as the leaders of the two extremes of political opinion, were Hamilton and Jefferson, Federalist and Republican.

They agreed as to one fundamental proposition, viz.: that popular sovereighty was the basis of free government. In

sympathies Hamilton was a monarchist, but he acknowledged the principles of the Declaration of Independence.

As to the question of the Republican form there was a wide divergence between Hamilton and Jefferson, but it is submitted that they fully represented the current extremes of opinion among the citizens who ratified the Constitution.

Their extreme interpretations of "republican form" may be accepted as including the entire contemporaneous interpretation, and no form between these extremes should be excluded in the present construction of the "republican form" which was guaranteed to the States.

Hamilton declared that "as long as offices are open to all men and no constitutional rank is established, it is pure republicanism." (Works, Vol. 2, page 416).

Also, "after all we must submit to this idea, that the true principle of the Republic is that the people should choose whom they please to govern them; representation is imperfect in proportion as the current of popular favor is checked." (Works, Vol. 2, page 44).

Hamilton went so far as to declare, "A reunion with Great Britain not impossible with the son of the present monarch in supreme government of this country." (Works, Vol. 2, page 421).

His conception of a republic was contained in the plan which he had prepared for the constitutional convention. (Works, Vol. 2, page 407; Elliot's Debates, Vol. 5, page 584.

This plan provided that the Governor of each State should be appointed under the authority of the United States, and that he should have the right to negative all laws about to be passed in the State. He proposed a Senate selected by electors of the several States who must be free-holders and should hold their offices during good behavior. The President was to be selected by electors chosen by free-holding citizens of each State and he should hold his office during good behavior. The justices of the Supreme Court were to hold by like tenure

together with all other judges. The House of Assembly contained the only officials who, according to his plan, had less than a life tenure based upon good behavior. He provided for the power of impeachment and regarded this, together with the original consent of the people to their constitution, as providing a complete basis of popular sovereignty.

Jefferson's conception of a republic is contained in his letter to John Taylor of May 28th, 1816. (Works, Vol. 6, page 605).

"The term *republic* is of very vague application in every language. Witness the self-styled republics of Holland, Switzerland, Genoa, Venice, Poland.

Were I to assign to this term a precise and definite idea, I would say purely and simply, it means a government by its citizens in mass, acting directly and personally, according to rules established by the majority, and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of its citizens.

Such a government is evidently restrained to very narrow limits of space and population. I doubt if it would be practicable beyond the extent of a New England township. The *first shade from this pure element*, which, like pure vital air, cannot sustain life of itself, would be where the powers of the government, being divided, should be exercised each by representatives chosen either *pro hac vice*, or for such short terms as should render secure the duty of expressing the will of their constituents. This I should consider as the *nearest approach* to a pure republic, which is practicable on a large scale of country or population.

The further the *departure from direct and constant control by the citizens*, the less has the government of the ingredient of republicanism."

Hamilton would have accepted a monarch, and while he accepted also popular government as a necessity, he described

it as "but pork still with a little change of sauce." Jefferson detested monarchy, insisted upon pure democratic forms as ideal, and regarded even representatives as "a shade from the pure element."

Hamilton's conceptions prevailed in the Constitutional convention, and since his time popular efforts have been directed to the amendment of his system.

Jefferson's "republican form" is at last realized under the machinery of the modern republic, in the Oregon Constition, which is before this court for judgment.

It is a living, breathing ideal, pitted against a decaying device.

6. PUBLIC OPINION IN 1887.

Madison in Federalist, Letter 43, explains the purpose of the guaranty clause and says "Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter."

Not to burden this presentation with citations which relate to current opinion at the adoption of the Constitution, one resolve is submitted which is monumental in its character and spoke the unanimous judgment of Massachusetts in the definition of free government.

"Resolved, unanimously, that the government, to be framed by this convention shall be a FREE REPUBLIC."

"Resolved it is of the Essence of a free Republic, that the people be governed by fixed laws of their own making."

Such was the preliminary declaration of the framers of the Massachusetts Constitution in convention assembled. Journal of the Convention, p. 24, Sept. 3d, 1779.

In this convention were James Bowdoin, President; Samuel Adams, John Hancock, Oliver Wendell, John Lowell, John Adams, John Pickering, Theophilus Parsons, Samuel Phillips, Jr. George Cabot, Capt. Chas. Sergeant, Nathaniel Gorham, Joseph

Allen, Gen. Jonathan Warner, Caleb Strong, John Cotton, William Cushing, Robert Treat Paine, David Sewall, James Sullivan, afterwards Attorney-General, many of whom are immortals in American history, and most of whom were as capable of defining the term "free republic," as any citizens of the new republics of America.

This definition of a free republic by the Massachusetts Constitutional Convention of 1779 has a parallel in the extemporaneous definition given by Governor Randolph in the Virginian Convention for the ratification of the United States Constitution.

"The empire of government of laws—is that in which the laws are made with the free will of the people: Hence, then, if laws be made by the assent of the people, the government may be deemed free." Elliot's Debates, Vol. 3, p. 34.

7. STATEMENTS IN CONSTITUTIONAL CONVENTION

The meaning of the term "republican form" was not debated in the convention, so as to define the views of the members, saving such utterances as will be found later under the heading of "Sovereignty."

The only form submitted which may have value is that of Randolph at a later stage of the convention, who made the following proposition to meet the wishes of the small states.

"III—That the people of each State ought to retain the perfect right of adopting, from time to time, *such forms of republican government as to them may seem best* and of making all laws not contrary to the articles of Union; subject to the supremacy of the general government in those instances only in which that supremacy shall be expressly declared by the articles of the Union."

Nowhere in Constitutional debates is an excess of power reserved to the people themselves even hinted at as unre-

publican. Some distrust of popular government was expressed by Gerry and others, but there was no suggestion of curbing these powers in the States.

IV. What Is "Republican Form?"

A. *NO FIXED STANDARD OF REPUBLICAN FORM.*

1. IN THE STATES.

Within the limits of the free exercise of the sovereign power of the people, there was no essential form fixed in the minds of the framers of the Constitution.

The separation of the three departments of government was not a vital feature of the new States formed from the colonies. It has been held by this Court that a legislature may exercise judicial functions.

Satterlee *v* Matthewson, 2 Peters, 413.

It was not essential that executive power or judicial functions should be vested in separate bodies. New Hampshire had no governor but a mere president appointed by the Council. Says Bancroft, "Here is a government without an executive which merged the executive power in the two branches of the legislature and made no provision for courts." (History of U. S., Vol. 8, page 243).

John Adams made strenuous objection to the creation of legislatures in a single body yet such was the form of the Pennsylvania Constitution.

John Adams' Works, Vol. 4, page 202.

Most of the States gave the veto power to the governor, yet Virginia withheld it "warned by its royal misuse."

Life tenure for judges was not universal; by the New Jersey Constitution, judges were appointed by the legislature for 5 and 7 years. The length of official tenure was not regarded as vital

even though John Adams pronounced that there was not "in the whole circle of the sciences a maxim more infallible than this: 'where annual elections end, there slavery begins.'"

2. FORMS VARIABLE AND ELUSIVE.

There is some significance in the limitations of the guaranty to the "form" of a republic. It is doubtful if anything can be challenged but the form, and it might well have been considered that with the proper forms the people would see to their proper execution, and if they did not it should be no concern of the United States. Were this not so, the most trifling occasions and technicalities might be availed of to call the central power to interfere with State administrations.

Mexico was undoubtedly Republican in form under Diaz, but the forms were perverted to a dictatorship; yet a mere show of revolution restored the people to their use of the duly provided forms. Such self-corrective power of State autonomy was doubtless relied upon when the form alone of Republican government was required of the States. Of such form the only test is the character of the general fabric.

Our experience with the Constitution of the United States has witnessed the practical nullification of many of the forms which were provided. The electoral college is non-existent as an independent body; the power of the President's cabinet is extra-constitutional; the senatorial power to consent to official appointments has become practically the control of such appointments.

Woodrow Wilson insists (Congressional Government, page 306) that the Constitution "is now our form of government rather in name than in reality, the form of the Constitution being one of nicely adjusted ideal balances, whilst the actual form of our present government is simply a scheme of congressional supremacy."

In England the Premier has boldly declared that "the King's veto is as dead as Queen Anne," and the recent concession by the

House of Lords of a vast portion of this power is a mighty change in substance without a change in form.

It was Lord Butte who well said, "The forms of a free and the ends of an arbitrary government are things not altogether incompatible."

John Adams in his "Thoughts on Government" (Works, Vol. 1, page 193) rebuked the poet Pope for false philosophy expressed in his lines, "For forms of government let fools contest; that which is best administered is best." "Nothing," said Adams, "can be more fallacious than this; nothing is more certain than that some forms of government are better fitted for being well administered than others."

The later provisions of Article 4, Section 4 for cases of invasion and domestic violence are very impressive in their suggestion that the substance of republicanism is to be preserved under that portion of the article, and that under the guaranty clause, the States are required only to furnish the *forms* of a free republic.

It is quite apparent that there are no particular forms contemplated as Republican by the Constitution.

"In the Constitution of Pennsylvania the executive department exercises judicial powers in the trial of public officers.—In New Jersey, in Georgia, in South Carolina and North Carolina the executive power is blended with the legislative."

James Wilson in Elliot's Debates, Vol. II, p. 505.

Clearly the direct election of representatives is not a requisite, as this very Court consists of men appointed by the President who is elected by an electoral college. It is likewise plain that a limited tenure is not essential as the members of this Court hold their offices during good behavior.

In the Constitutional period the selection of judges was not by the people but in the form of appointment under the English precedents. That the people of most of the States have decided to elect their judges constitutes clearly no invasion of

the republican form. If it be true that the only basic requisite of republican form be its recognition of the continuing sovereignty of the people, such form would seem to relate to the machinery of the government; the shape it takes must be such that the popular will shall be in all parts operative or shall always permit expression of consent of the governed.

Pure Democracy has never been regarded as inconsistent with such form, but on the contrary has been deemed its most perfect form.

Oligarchy and monarchy are the only inconsistent forms, namely, the power of one or of less than a majority to determine the rights of the whole.

There is no doubt that the speech of James Wilson in the Convention of Pennsylvania for the Ratification of the Constitution, November 24th, 1787 exercised a profound influence upon the public opinion with respect to the Federal Constitution.

B. *"DEMOCRATIC" AND "REPUBLICAN" SYNONYMOUS.*

It is apparent from the discussions of the Constitutional period that no distinction existed in the larger conception of the words "democracy" and "republic." This is true even of ancient authorities.

"There are three sorts of public government, to wit: Monarchy, which is regality or kingship, Oligarchy, which is the government by peers and nobles and Democracy, which is a popular or (as we term it) a free State."

Plutarch's Morals, Vol. V, p. 396.
Tacitus' Annals, Book IV, Ch. 33.

"If we consider the nature of civic government, we shall find that, in all nations, the supreme authority is vested either in the people, or the nobles or a single ruler."

Charles Pinckney a member of the Constitutional Convention quotes Paley, Vol. II, 174, 175, who enumerates three forms of government, Despotism, Aristocracy, and a Republic and defines the latter as "a republic, where the people at large EITHER COLLECTIVELY OR BY REPRESENTATION form the legislature." Elliot's Debates, Vol. IV, p. 328.

Hamilton in his brief for argument on the Constitution of the United States (1788, Works, Vol. II, p. 463) makes it plain that "republic" was a term variously understood. He asserts that it has been applied to aristocracies and monarchies as Rome and Great Britain under kings, Sparta and Carthage through a *senate for life*, Netherlands through aristocracy and monarchy.

He adverts to the confusion about the words Democracy, Aristocracy and Monarchy, designating Democracy, as defined by Rousseau, as a government exercised by the collective body of the people and any delegation creating an aristocracy. But he says:

"Democracy in my sense where the *whole power of the government in the people;* 1, whether exercised by themselves or, 2, by their representatives, chosen by them either mediately or immediately and legally accountable to them."

He divides governments not into Republics &c., but into Democracy, Aristocracy, Monarchy, and defines *Aristocracy*—"Where whole sovereignty is permanently in the hands of a few for life or hereditary" and *Monarchy*—where whole sovereignty is in the hands of one man for life or hereditary."

The "consequence" is that the United States Government is a "representative *Democracy.*"

John Marshall in Virginia Debates on Constitution, (Elliot's Debates, Volume 3, page 222) deals with the United States Constitution as creating a "Democracy."

"I conceive that the object of the discussion now before us is whether Democracy or despotism be most eligible. I am

sure that those who framed the system submitted to our investigation, and those who now support it intend the establishment and security of the former.

"We, sir, idolize the Democracy; those who oppose it have bestowed elogiums on monarchy. We prefer this system to any monarchy, because we are convinced that it has a greater tendency to secure our liberty and promote our happiness. We admire it because we think it a well-regulated Democracy. It is recommended to the good people of this country; they are through us to declare whether it be such a plan of government as will establish and secure their freedom."

"Switzerland," that confederate republic, has stood upwards of 400 years; and although several of the individual republics are democratic and the rest aristocratic, no evil has resulted from this dissimilarity." Patrick Henry, in Virginia Debates, Elliot's Debates, Vol. IV, p. 62, and at p. 44,—"Holland is not a Democracy wherein the people retain all their rights securely."

James Wilson said (Elliot's Debates Vol. II, page 365) "then let us examine, Mr. President, the three species of simple governments which are . . . the monarchial, aristocratical and democratical."

C. *THE REPRESENTATIVE SYSTEM.*

1. A NECESSITY: NOT A PRINCIPLE.

Historians are agreed that where Democratic forms have prevailed they have yielded to representative or delegate forms only from the necessities arising from extension of population and territory. It has been pointed out (*supra* III, B. 4, a.) that this was true of the Teutonic institutions of England.

Concerning the Plymouth Colony, "The government was first a pure democracy; the whole body of the people often met and divided upon affairs both executive and legislative. As their numbers increased, this was found inconvenient;

and in 1639 a House of Representatives was established, and Representatives elected from the several towns."

Pitkin's History United States, p. 34.

Bancroft's History of United States, Vol. VIII, p. 370, says:

"The Republics of the ancient world had grown out of cities, so that their governments were originally municipalities; *to make a republic possible in the large territories* embraced in the several American Colonies *where the whole society could never be assembled*, power was to be deputed by the many to the few, who were to be elected by suffrage, and were in theory to be a faithful miniature portrait of the people."

The Charter of "the Governor and Company of Massachusetts Bay, granted 1629 by Charles I, provided that

"The freemen of the company were to hold a meeting four times a year; and they were empowered to choose a governor, etc.:"

"After their arrival in Massachusetts, their numbers increased so rapidly that it became impossible to have a primary assembly of all the freemen, and so a representative assembly was devised after the model of the Old English County Court."

John Fiske's "Civil Government in the United States," pp. 161, 162. (Cambridge Press Edition, 1902).

"As a Republican, sir, I think that the security of the liberty and happiness of the people from the highest to the lowest, being the object of government, the people are consequently the fountain of all power. They must, however, delegate it to agents because from their number, dispersed situation and many other circumstances, they cannot exercise it in person."

Edmund Pendleton, Elliot's Debates, Vol. 3, 298.

Mr. Wilson, a Swiss Official, says of the Initiative and Referendum in Switzerland that

"They have given back to the people the right they once possessed to take part in the legislation of their respective Cantons. The right was surrendered when the people *became too numerous* to assemble together for law-making, and so representatives were chosen to make the laws."

The conception of a general assembly of the State is involved in the address of the Massachusetts "Convention for framing a new Constitution of government"—to their constituents, March 2, 1780.

"Could the *whole* body of the people have convened for the same purpose, there might have been equal reason to conclude that a perfect unanimity of sentiments would have been an object not to be obtained."

Journal of Mass. Convention Appx., p. 216.

John Adams in Thoughts on Government, Vol. IV, p. 194, says:

"As good government is an empire of laws, how shall your laws be made? *In a large society, inhabiting an extensive country, it is impossible that the whole should assemble to make laws.* The first step, then, is to depute power from the many to a few of the most-wise and good," and at p. 195—"This representative assembly—should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them."

2. PHILOSOPHY OF REPRESENTATIVE SYSTEM.

The conception that the principle of representation somehow qualifies the sovereignty of the people suggests the German adage!

"Wo die Begriffe fehlen, da stellt zu rechter Zeit ein *Wort* sich ein."

(When comprehension fails, a *word* happens opportunely in.)

It is true in the larger sense that the whole government must represent the popular will, but it is not true that all its functions

must be performed through delegates. It suffices if the things done "represent the will of the majority of the people" and this is the length and breadth of the representative system in a Republican government. The manner in which this is accomplished is merely functional and in no sense fundamental.

It does not need argument or citations to prove that our governments are and must be affected by the representative principle and practice. The error of the appellant in his claims is in assuming that legislation *must* under the Republican principle take the form of a delegated power. The various expressions indicating that some kinds of representation are necessary are essentially true because all acts of government cannot be performed by the mass. Even in the forum of Rome, there were senators, tribunes, praetors and ædiles. In the town meeting, the present form of democracy, sit the selectmen, assessors, town clerk, constables and other representatives of the people of the town in the execution of their behests. There sits the justice of the peace, their agent or representative to perform the judicial functions. Clearly the citizens in mass cannot pay bills, assess and collect taxes, keep the records and make arrests.

A democracy without agents and representatives is inconceivable. In the executive functions, the representative system is physically essential to a pure democracy.

The judicial functions might be exercised directly by judgments and decrees settled in mass, but the service and execution must be delegated to certain persons.

But the legislative or law-making power may be physically exercised without the intervention of agents or the power may be delegated to agents who are called "representatives," because they in theory carry out the will of the electorate. Hence representative legislation is the exercise of the people's sovereignty, not by virtue of any sovereign power inherent in the persons who represent, but purely by virtue of the sovereignty imparted to them by the people.

There is no legal or constitutional principle which warrants the claim that when the people decline to delegate their sovereignty, the republic fails.

Representation so far as it is a necessity must exist, but the necessity is limited and variable, and between its maximum and minimum is no line which marks the Republican boundaries.

Legislators may be dispensed with and the popular will remain in full power. A legislature is no more essential to a Republican form, than agents are essential to a business. They may be functionally necessary, but do not inhere in the business.

James Wilson (Elliot's Debates, Vol. II, page 358) says that even in England, "though we find representation operating as a check it cannot be considered as a prevailing principle."

3. POWER OF LEGISLATURES DELEGATED AND LIMITED.

a. *DELEGATED POWER.*

The legislature is a pure creature of the State. While it is necessary to make laws, it is not necessary to have legislatures. If the people choose they may cease to create, and the creature will cease to exist.

The status of legislatures is already well established in the decisions of this court. In

Van Horn's Lessee *v* Dorrance, 2 Dall. 304,

Mr. Justice Patterson describes the source and extent of legislative power.

"The Constitution of England is at the mercy of Parliament. Every act of Parliament is transcendant and must be obeyed."

In America "a constitution is the form of government *delineated by the mighty hand of the people*, in which certain first principles of fundamental law are established. It contains the permanent will of the people and is the Supreme *law* of the land; it is paramount *to the power of the legislature*, etc.—The legisla-

tures are *creatures* of the *constitution:* they owe their existence to the constitution, they derive their powers from the constitution. The *constitution* is the work or will of the people themselves in their original, sovereign and unlimited capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creator, and the other of the creature. The Constitution fixes *limits to the exercise of the legislative authority, and prescribes* the orbit in which it must move."

Calder *v* Bull, 3 Dall. 386, states:

"It is a self-evident proposition that the several State legislatures retain all the *powers of legislation delegated to them by the State constitutions*, etc."

Fletcher *v* Peck, 6 Cranch 87, says:

"One legislature is competent to repeal any general act, which a former legislature was competent to pass, and one legislature cannot abridge the powers of a succeeding legislature."

Hamilton (Works, Vol. 2, page 322) recognized the exact limits of legislative power.

"Happily for this country the position is not to be controverted that the Constitution is the creature of the people; but it does not follow that they are not bound by it, while they suffer it to continue in force; nor does it follow that the legislature which is, on the other hand, a *creature of the Constitution*, can depart from it on any presumption of the contrary sense of the people. *All the authority of the legislature is delegated to them* under the Constitution; their rights and powers are there defined."

James Wilson (Elliot's Debates, Vol. II, p. 446) says:

"The supreme power resides in the people—They can delegate it in such proportions to such bodies, on such terms, and under such limitations as they think proper."

Story, (Comm. 1, Section 628) commenting upon the fact that the new confederation which had been created by the legislatures of the States really had no Constitutional authority, remarks. "If the State in its political capacity had it (the right) it would not follow that the legislature possessed it; that must depend upon the powers confided to the State legislature by its own Constitution; a State and the legislature of a State are quite different political beings."

b. *LIMITED POWER; INSTRUCTION AND RECALL.*

These powers of sovereign control over legislators have been recognized since representative government began in this country.

The Body Liberties of Massachusetts Bay Colony, 1641, No. 67, declares:

"It is the constant libertie of the freemen of this plantation to choose yearly at the court of election out of the freemen all the general officers of this jurisdiction. If they please to discharge them at the day of election, by way of vote they may do it without showing cause, but if at any other general court, we hould it due justice that the reasons thereof be alleadged and proved." From laws of New Hampshire, Volume 1, page 759.

The Articles of Confederation (March, 1781) recited:

"For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct to meet in Congress on the first Monday in November of every year, *with a power reserved to each State to recall* its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year."

The original form of Constitution introduced by Randolph in the Constitutional Convention provided for a House of Rep-

resentatives elected by the people "and to be subject to recall." Apparently this provision dropped out of the later forms without discussion.

The instances of instructions to delegates in the Colonies are too numerous to recite.

The Boston town meetings had frequently instructed their representatives, though they were such men, for instance, in 1768, as James Otis, Samuel Adams, John Hancock, and Thomas Cushing, and did so in 1764, '65, '67, '68, '69, '70, '72, and '74.

The town meeting in Boston in May, 1764, after electing four representatives, proceeded to instruct them as follows: "By this choice, we, the free-holders of the town, have delegated you the power of acting in our public concerns, in general, as your prudence shall direct you; *reserving to ourselves the Constitutional right of expressing our minds and giving you such instructions upon important subjects, as at any time we may judge proper,*" and then proceeded, through John Adams, who acted as spokesman, to lay down the principles of self-government in opposition to the claims of the British Parliament.

It has been well stated that

"This Constitutional Right of expressing their minds and giving instructions inevitably resulted from the fact that in both Boston and New Plymouth all freemen had originally a personal voice in the transaction of public business at the General Courts." (History of Elections in the American Colonies, by C. F. Bishop.)

D. *"SOVEREIGNTY" THE ONLY TEST OF FORM.*

1. WHAT IS SOVEREIGNTY?

"Sovereignty is the right to govern."

"Our governors are the agents of the people and at most stand in the same relation to their sovereigns in which regents

in Europe stand to their sovereigns." Justice Wilson in Chisholm *vs.* Georgia, 2 Dall. 470.

Sovereignty necessarily implies supremacy; it is indivisible, indefeasible and inalienable, though it may be delegated. Jameson Constitutions, p. 20.

"There can be no subordinate sovereignty"—

"There cannot be two sovereign powers on the same subject."

James Wilson in Elliot's Debates, Vol. II. pp. 443, 456.

Hamilton has well said in the Constitutional Convention (Elliot's Debates, Vol. V, page 202) "two sovereigns can not co-exist within the same limits."

This principle makes it impossible that the sovereignty of the people should co-exist with the sovereignty of the legislature.

If a legislature be sovereign it must have final power to make laws; possessed of such power the anomaly is presented of sovereign States which are compelled to create legislatures to be sovereign over the people who created them.

Sovereignty is not a matter of degree but of kind.

James Wilson (Journal of Massachusetts Convention, 1788, p. 364) says "In all governments . . . there must be a power established from which there is no appeal and which is, therefore, called absolute, supreme and incontrollable. The only question is where that power is lodged."

See also Charles Pinckney in South Carolina Debates (Elliot's Debates, Vol. IV, p. 327).

2. WHERE IS THE SOVEREIGNTY?

a. *IN THE PEOPLE.*

"The people are the only legitimate fountain of power." James Madison, Federalist No. XLIX.

"Our political creed is, without a dissenting voice that can be heard, that the will of the people is the source, and the happi-

ness of the people the end, of all legitimate government upon earth." John Quincy Adams in his first message to Congress.

In the United States the Supreme power "remains and flourishes with the people, and under the influence of that truth we at this moment sit, deliberate and speak.....that the supreme power, therefore, should be vested in the people is, in my judgment, the great panacea of human politics. It is a power paramount to their constitution, inalienable in its nature and indefinite in its extent."

James Wilson, Journal of Mass. Convention, 1788, p. 365.

"A share in the sovereignty of the State which is exercised by the citizens at large in voting at elections—in a Republic ought to stand foremost in the estimation of the law. It is that right by which we exist a free people.—That portion of the sovereignty to which each individual is entitled can never be too highly prized."

Hamilton, in Works, Vol. VI, p. 271.

"The legislatures have no power to ratify it. They are the mere creatures of the State constitutions and cannot be greater than their creators.—Whither then must we resort? *To the people, with whom all power remains that has not been given up in the constitutions derived from them.*" It was of great moment, he observed, that this doctrine should be cherished, *as the basis of free government.*

Geo. Mason of Virginia (Elliot's Debates V, p. 352).

Abraham Lincoln said in a speech at Peoria in 1854: "According to our ancient faith the just powers of government are derived from the consent of the governed. * * * Allow all the governed an equal voice in the government and that and that only, is self-government."

Charles Pinckney, one of the delegates in the Philadelphia Convention, spoke in the ratifying Convention of South Carolina (Elliot's Debates, Vol. IV, pp. 318, 326), as follows:

"We have been taught here to believe that all power of right belongs to the people; that it flows immediately from them, and is delegated to their officers for the public good; that our rulers are the servants of the people, amenable to their will and created for their use."

Speaking of the United Netherlands, he says:

"According to my idea of the word it is not a republic; for I conceive it as indispensable in a republic that all authority should flow from the people."

b. *PASSAGE FROM STATE TO PEOPLE.*

The idea of sovereignty in the people was not original with the makers of the constitution. Locke and Rousseau had long before expounded the principle.

It found its first great expression in the Declaration of Independence at the hands not of the people but of "the representatives of the United States of America in Congress assembled."

There is no doubt that the original conception of sovereignty by the colonies was that of corporate sovereignty. The articles of confederation were made not by the people but "between the States of New Hampshire, Massachusetts Bay, etc," and each State asserted therein "its sovereignty, freedom and independence."

The articles were prepared by a legislature which had no authority from the people, and they were referred for ratification not to the people but to the legislatures of the State. The submission by the people this legislative usurpation in the framing of their national government shows how imperfect was the existing conception of popular sovereignty. The people had just formed their constitutions and hugged them as a dear possession secured by their blood and sufferings. They were jealous of their State independence, and the weak alliance of the confederation proved pitiably ineffective because the States would not trust sufficient delegation of national power.

"Oliver Ellsworth of Connecticut, said in the Federal Convention:

"As to the first point he observed that a *new set of ideas seemed to have crept in since the articles of confederation* were established. *Conventions of the people*, or with power derived expressly from the people, *were not then thought of.* The legislatures were considered as competent. Their ratification has been acquiesced in without complaint."

On the first impact of independence and supreme authority, the State seemed to be the prize which revolution had secured. The confederation was a beginning not an end; constitutional confederation constituted progress in popular government. Yet it was but the opening of the expanding system of self-government which was to ripen into more perfect forms such as are represented in the full legislative sovereignty of the people of the State of Oregon under their amended constitution.

3. DIRECT EXERCISE OF SOVEREIGNTY BY THE PEOPLE.

a. *STATES ENTITLED TO CHOOSE THEIR FORMS.*

Webster described the unlimited power of sovereignty in his reply to Hayne:

"The people, sir, erected this government. * * * Gentlemen do not seem to recollect that the people have the power to do any thing for themselves."

George Washington said in his farewell address: "The basis of our political system is the right of the people to make and alter their constitutions of government."

"For I insist if there are errors in government, the people have the right not only to correct and amend them, but likewise totally to change and reject its form; and under the operation of that right the citizens of the United States can never be wretched beyond retrieve unless they are wanting to themselves."

James Wilson, Journal of Mass. Convention, 1788, p. 364.

The Declaration of Independence, to the principles of which all new States have been expressly required upon their admission to the Union to conform, asserts the supreme right of the people "to institute new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."

The people of Buckingham County instructed their delegates to the Virginia Convention, which first declared the independence of the colonies, in the words, "the Supreme Being hath left in our power to choose what government we please for our civil and religious happiness."

The bill of rights of the Massachusetts Constitution declares that by right, the people of the Commonwealth, "invest their legislature with authority" and "provide for an equitable mode of making laws."

b. *SOVEREIGNTY EXTENDS TO CONSTITUTIONS AND STATUTES.*

Constitutions are not limited to organic law.

Whatever may be the theoretical and aesthetic division between organic and statute law, this division, as to Constitutions is urged only by text-writers as a matter of policy, and nowhere has a court undertaken to limit constitutional conventions or constitutional amendments to organic law.

The original Constitutions of the States contain many provisions of a statutory nature, and since that time the practice has grown perhaps to an unreasonable extent; but the practice has its justification in the distrust of legislatures by the people and the necessity they have found of curbing ordinary legislative powers. That extensive provisions of a statutory character are not open to legal or political objection is notably evidenced by the admission of Oklahoma to the Union under a Constitution which is crowded with such provisions. The Courts likewise have not distinguished between such legislative provisions and organic laws.

Constitutional limitations of a statutory character are so extensive that upon analysis of the existing conditions they will be found to constitute the great bulk of constitutional texts. Examine Stimson "Constitutions."

The recognition of this power to enact legislation in constitutional form is a definite recognition of the full authority of the people of a State to enact legislation at their free will, and under such forms as they may constitutionally provide. Nowhere has this court or any other court undertaken to say in what exact form the people shall give expression to their sovereign will. The courts of some States, but not yet of the United States, have recognized that Constitutional conventions may even promulgate Constitutions without the ratification of even the preliminary consent of the people.

However questionable these decisions may be they illustrate the great possible exemptions from fixed forms which are allowed in expressing the popular will, even through the mere process of acquiescence. With how much greater reason is it accorded to the people in united action when they directly declare the law of the State?

No one questions the sufficiency of a Constitution which is ratified by the popular vote, and it seems immaterial and technical to inquire into the form in which popular action is thus expressed. It must be beyond question that if the people choose to determine Constitutional questions directly at the polls rather than through a convention, they have a power to do so, and it must be incontestable that the common practice of initiation of amendments by legislatures is a mere matter of convenience and not of principle. When, therefore, the people of Oregon fixed for themselves the method of popular initiation of Constitutional amendments and a direct vote at the polls upon such amendments, their power so to do cannot be questioned by any court.

It seems to be a necessary corollary to this statement that the people's power at the polls over questions of a statutory

nature is not any more limited than it would be in a Constitutional Convention. If it were otherwise, it would be demonstrated that there is somewhere a judicial or political inhibition upon the people in Constitutional assemblage to pass from a field of organic into a field of statutory enactment, but as is above suggested no such inhibition exists.

We are, therefore, dealing in this case with a mere matter of form which it requires very little ingenuity to change.

In the early history of the Plymouth Colony in 1638, the first experiment with legislation by delegates was made, and it was provided as to any laws which such delegates might enact, "That the freemen at the next eleccon court after meeting together may repeale the same and enact any other usefull for the whole."

The people of Oregon might copy from the Pilgrim Fathers and provide that at each election any laws passed by a previous legislature might be repealed. This would constitute an optional referendum of all legislative acts. Surely with a greater sovereign power than could ever be conceded to the Plymouth Colonists, the people of Oregon might declare that every election should constitute a Constitutional Convention of the people to propose and enact their own measures as well as to repeal those of the legislature. Such indeed is the practical operation, and it may be said, the legal effect of the constitutional provisions now in force in Oregon.

Each gathering of the people at election day is in effect a constitutional convention at which the sovereign powers of the people are only limited by their own Constitution and the Constitution of the United States.

Constitutions are creators of law—they are called organic law, because they contain the plan or means of government, and the making of a Constitution is legislation of the highest type. Legislatures cannot meddle with it.

Threadgill *v.* Cross, 109 Pac. Rep. 558 (Ok. 1910).

It is conceivable that a Constitution might put forth an entire code of the law, and leave no powers to a legislature, giving to the people locally or generally assembled or represented the sole power of alteration through amendment of the Constitution itself. It has not yet been decided that a permanent body of delegates, empowered to legislate, is an essential of a republican form of government. The town meeting still exists unchallenged, and nowhere does it appear that a city, a county and indeed a whole State may not act in like accord, if the people can find methods satisfactory to themselves.

If the perfection of the secret ballot system provides such a method, what prohibitions of ancient charters or customs shall avail against this form of legislating in the State.

c. *THE RIGHT OF DIRECT LEGISLATION.*

When this court inquires into the right of the people of Oregon to make their laws at the polls, it should do so in the spirit of Mr. Justice Holmes when he made similar inquiry as a justice of the Supreme Court of Massachusetts:

"I ask myself as the only question what words express or imply that a power to pass a law (subject to rejection by the people) is withheld." Opinions of Justices, 160 Mass. 594.

. . . "The Supreme power is in a democracy "inherent in the people and is either exercised by themselves or by their representatives." James Wilson, Elliot's Debates, Vol. II, p. 365.

Andrew Jackson, in his inaugural address, said: "Experience proves that in proportion as agents to execute the will of the people are multiplied there is danger of their wishes being frustrated. Some may be unfaithful; all are liable to err. So far, therefore, as the people can with convenience speak, it is safer for them to express their own will."

Commenting on the statement that the people who delegate power "have a *right to resume it*, and place it in other hands

or keep it themselves, whenever it is made use of to oppress them, &c." John Adams answered:

"These are what are called revolution principles. They are the principles of Aristotle and Plato, of Livy and Cicero and Sidney, Harrington and Locke; the principles of nature and eternal reason; the principles on which the whole government over us now stands. It is therefore astonishing, if anything can be so, that writers, who call themselves friends of government, should in this age and country be so inconsistent with themselves, so indiscreet, so immodest, as to insinuate a doubt concerning them." Works, Vol. IV, p. 14.

Jameson (Constitutions, p. 21) says:

"Sovereignty manifests itself in two ways, *first indirectly*, through individuals, acting as the agents or representatives of the sovereign and constituting the civil government; and *secondly, directly*, by organic movements of the political society itself without the ministry of agents."

"A portion of this sovereign power has been delegated to government which represents and speaks the will of the people so far as they *choose* to delegate their power."

Luther *vs.* Borden, 7 How. 29.

The sovereignty of the people being conceded the claim that the law making power can only be exercised through delegates has a fair parallel in the reasoning of the chambermaid, who insisted upon hanging a picture of the leaning tower of Pisa awry, and explained that she could only get the tower to hang straight by hanging the picture crooked.

The assertion that the sovereignty of the people is sufficiently exercised by a legislature, is well met in the words of Washington, when the Confederation was toppling and he was asked to use his influence:

"Influence is not government."

d. *OREGON IS A REPUBLIC.*

If the people reserve their original power to themselves and delegate to their agents only limited legislative functions, the republican form is not lost but perfected. The only test of such form is the supremacy of the popular will, and nowhere is it supreme except in the original exercise. Any uncontrolled delegation is a qualified or indirect supremacy.

A monarchy is not less a monarchy because the sovereign elects to act personally rather than through ministers; aristocratic sovereigns need not put their power out of their own hands in order to act effectively. By what token shall it be said that a sovereign people, constituting a republic, ceases to be republican, when it dispenses with delegates and acts directly?

Surely the people may grant such restricted power to their delegates as they choose, and powers not granted and thus reserved are not lost to the people. We cannot make any key fit such a lock.

There is no law, which sets the legislature above the people; not in the decisions of Courts, not in the Constitutions or the conventions which made or ratified them, not in early colonial history, where pure Democracy had been the foundation of government.

There is a rank incongruity in the propositions that in a republic the people must be sovereign, and that a government ceases to be a republic when the people refuse to delegate all their sovereign power of legislation to agents.

A people is not sovereign which has not the power to exercise its sovereignty, and a delegate body is the sovereign if it has power to deny to its principal the right to resume and exercise the delegated power. Only when the sovereign *voluntarily* relinquishes its right to exercise any sovereign function to delegates can the delegates have logical claim to possess the sovereign power. We call this voluntary relinquishment a constitution.

After a century of repetition of the evident truth that delegates of the sovereign function must trace their authority to the constitutional grant, the claim is now made, that our Re-

publican form has ceased to exist, and the republic has disappeared if the sovereign has declined to abdicate its full sovereign power to its agents, and chosen to reserve certain of such powers to itself, and indeed only power which is withdrawn upon the failure of the representatives to represent.

May not the sovereign say to his agents, "You must represent me, you must execute my will, or I shall exercise the power myself." If this illogical contention can stand, it must involve the downfall of the entire theory of popular sovereignty.

James Wilson whose influence in the federal convention and with the people of the States was second to none made brilliant and conclusive answer to the contention of this appellant. "No, sir, I have no right to imagine that the reflected rays of delegated power can displease by a brightness that proves the superior splendor of the luminary from which they proceed."

The People of Oregon have not been disappointed in the direct exercise of their sovereign functions. Nine other States have followed in their footsteps; the wisdom of their course is reflected in the laws they have thus enacted. Democracy has been vindicated; it promises to bring better government, better citizenship and a perfect republic. The people are fit to govern themselves; and are justifying the confidence and injunction of the martyred Lincoln.

" No men living are more worthy to be trusted than those who toil up from poverty; none less inclined to take or touch aught which they have not honestly earned. Let them beware of surrendering a political power which they already possess, and which, if surrendered, will surely be used to close the door of advancement against such as they, and to fix new disabilities and burdens upon them till all of liberty shall be lost."

GEO. FRED WILLIAMS,

Counsel for the States of California, Arkansas, Colorado, South Dakota and Nebraska, who pray to be heard as *amici curiae.*

Of Counsel for the State of Oregon.